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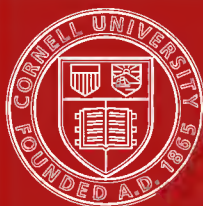
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The Land Commission Reports.

REPORTS OF CASES

DECIDED BY

THE IRISH LAND COMMISSION.

REPORTED BY

LUKE DILLON AND DANIEL KEHOE,

ESQUIRES,

BARRISTERS-AT-LAW.

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NOTE.

FIVE Parts of these Reports have already appeared, containing the leading decisions on the Land Law (Ireland) Act, 1881, and the Practice of the Court of the Land Commission :—

Parts I.—IV.—Price 9d. each.

PART I. (November), containing *Knipe v. Armstrong, &c.*

PART II. (December), containing *Shiel v. Borrowes ; Rutledge v. Rutledge, &c.*

PART III. (January), containing *Ewart v. Gray ; Kelly v. Griffith, &c.*

PART IV. (February), containing *Barrett v. Lord Ventry ; Adams v. Dunseath, &c.*

Double Number—Price 1s. 6d.

PART V. (March), containing *Adams v. Dunseath* (on Appeal).

THE LAND COMMISSION REPORTS.

INTRODUCTION.

THE Editors, in bringing out these Reports, intend them to afford facilities to the Profession for having a record of the decisions of THE IRISH LAND COMMISSION, both as to law and practice. As regards practice, the observations of MR. JUSTICE O'HAGAN on the opening of the Court were of so valuable a nature that, although they do not properly fall within the scope of a series of legal Reports, they are printed as an Introduction to these Reports. Instead of an essay on the practice of the Court, it has been thought better to provide an Index or Digest of subjects, arranged in an alphabetical order, giving reference to the page of the Report at which the decision is reported. This will, it is hoped, be more convenient for immediate reference, and will be continued in subsequent numbers of these Reports; thus forming, when the volume is complete, a digest of the entire series of decisions. The Editors have to express their thanks to the Commissioners for having revised the more important decisions.

ADDRESS OF MR. JUSTICE O'HAGAN, ON THE OPENING OF THE
LAND COMMISSION, ON OCTOBER 20TH, 1881.

“We have thought it right that on this, the first occasion on which the COURT OF THE LAND COMMISSION sits, some brief words should be said from this Bench, not explanatory of the Land Act of 1881, which has received abundant and very able explanation at other hands, but explanatory of our general course of procedure, and more especially of the motive and purpose of this sitting.

“When we found ourselves entrusted with the execution of a measure designed to confer great and immediate benefits upon the Irish tenant who should avail himself of them—the benefit, above all, of a secure tenure at a fair rent—and containing provisions enabling him to become the absolute and unfettered owner of his holding—when this great trust was committed to us, we resolved to do our utmost to render the procedure through which these great ends were to be attained one of extreme simplicity, as free as possible from all the snares and pitfalls of technicalities. Whoever has read the Rules and Forms which, in obedience to the Act, we have framed and promulgated, can judge in what degree we have succeeded in effecting this object. There are no pleadings, no elaborate enumeration of particulars, no statement of claim or of dispute. A tenant, for example, desiring to have a fair rent fixed for his holding, serves notice on his landlord, saying so, and stating the circumstances of his holding as to situation, present rent, and valuation—all of which lie easily within his own knowledge. He has his choice as to the Court. He may either select the Civil Bill Court of the county or the Land Commission. And so soon as a copy of the notice is transmitted by post to the Clerk of the Peace or the Secretary of the Land Commission, the case is in Court, and will as early as possible receive a trial. Further, as we have sought to render the proceedings simple, so we have endeavoured to make them inexpensive. The sole duties made chargeable are a shilling on each Originating Notice (that is, the notice which brings the case into Court) and a shilling on each Notice of Appeal. We thought it right that these small duties should be imposed, if for nothing else, as a test of good faith, and they are such as no suitor commencing proceedings in good faith would complain of.

“And now as to a point of practice. It has been asked what copy of the Originating Notice should have the impressed stamp. The intention is that the stamped document should be the Originating Notice which is retained by the party to be produced by him at the hearing. If, however, any copy of the Originating Notice has in fact been stamped, we shall not, at least for some

time to come, consider that fact as forming an objection to our proceeding with the case. Moreover, it has happened, and not unnaturally, considering the novelty of this tribunal and its practice, that in some instances Originating Notices to fix a fair rent have been served, and that through oversight neither the original nor any copies bore a stamp. In view of this state of facts, we entered into communication with the authorities of the Stamp Office, and we have ascertained that in such cases they will permit the notice to be stamped *ex post facto*. And if this be done before the actual trial of the case, we shall for the present consider it sufficient. We have, besides, endeavoured to render service of the notice easy by following the familiar method presented by the Civil Bill Acts, and by inducing parties to employ the civil bill officers, who are acquainted with the proper method not only of effecting service, but of endorsing the particulars with a view to proof. From long experience I can speak of the civil bill process-servers with just praise as an intelligent and faithful body of men; and in effecting service of these notices on behalf of the tenants they are likely to show themselves friendly and zealous. We have also in all proper cases adopted the machinery of service through the Post Office. We need only add that the Court will not hesitate to direct substitution of service whenever it deems it right to do so.

“ We turn now to the special object of this sitting. A large number of Originating Notices have been served by tenants seeking to have a fair rent fixed. In some of these the Civil Bill Court has been the tribunal selected, but in the great majority of cases the application is made direct to the Land Commission. In none of these cases will it be possible to have an action tried for at least ten days to come, and they will be tried, pursuant to the Rules, as near to the holding as possible. But there is a clause in the Land Act of this year which makes very important rights depend upon what may take place at the first sitting of the Court. By the 60th section, any application which a tenant is authorized to make to the Court shall, if made to the Court on the first occasion on which it sits after the passing of

this Act, have the same operation as if it had been made on the day when the Act came into force ; and any order made on such application shall be of the same effect as if it had been made on the day on which the Act came into force, unless the Court otherwise direct. And the person by whom such application is made shall, if the Court thinks just, be in the same position, and have the same rights as regards his tenancy, as he would have been in and would have had if the application had been made on the day on which the Act came into force.

“I have said that very important rights are preserved by this section. In the first place, every tenant who has served notice on his landlord to have a fair rent fixed, and who at this sitting makes formal application to the Court for that purpose, will be entitled to have such application now recorded, and to have it embodied in any order fixing the rent which may be hereafter made ; so that the judicial rent will apply not only to the gales which may accrue after the date of the order, but to those which accrued since the 22nd of August, 1881, the date of the passing of the Act. But there is a class of cases in which the effect of the 60th section is of still greater moment. Under the 13th section a tenant has the power of selling his tenancy notwithstanding a judgment or decree in ejectment, if the writ of *habere* has not been actually executed ; and in ejectments for non-payment of rent, even although the writ has been executed and possession taken, provided the six months allowed for redemption have not expired ; and the tenant may during the same period apply to fix a judicial rent. Moreover, in all cases in which a sale is delayed by reason of an application being made to the Court, or for any other reasonable cause, the Court has power to enlarge the time during which the tenant may sell, or in ejectment for non-payment of rent to redeem the tenancy.

“By the ordinary law, the decree or judgment in ejectment, followed by the execution of a writ of *habere*, puts an end to the tenancy. A power of redeeming and restoring it is given in ejectment for non-payment of rent for six months, but at the end of that period the tenancy is irrevocably gone. But now, by the operation of the 60th section, a tenant evicted for non-

payment of rent, when possession was taken by the landlord within six months before the 22nd of August, 1881, has the same right to apply to the Court at its first sitting as if the Court were sitting on the 22nd of August.

“I will now advert to an important question which arises on the 13th section. It is clear that when an evicted tenant, whose rights are preserved by the 60th section, desires to sell his tenancy, we can extend the time for redemption, in order to enable him to do so. But it has been contended that we have an absolute power in such a case to extend the time for redemption, whether the tenant desires to sell or not. Our impression, I am bound to say, is that the 13th section does not go so far, and that the words at the beginning of the paragraph referring to the delay of sale govern the entire paragraph. We are, however, quite prepared to have the question argued if anyone desire it.

“Returning to the effect of the 60th section, it will be observed that the application must be made to the Court on the first occasion on which it sits. Now, if we had merely delegated to the Sub-Commission the jurisdiction to try the cases which had to be decided in various parts of the country, considerable difficulty might arise as to what would be deemed to constitute the first occasion on which the Court sat; and the valuable rights intended to be preserved by the 60th section might be imperilled or lost. We therefore thought it right to appoint and advertise a time for the sitting of the Land Commission as a Court here in Dublin, which would be unmistakably, and beyond controversy, the first occasion on which our Court should sit. That is the present sitting. We are prepared to hear applications in any of the classes of cases to which I have referred. And if in particular cases no notice has been served, we will permit the application to be made, in the first instance, without notice, so as to bring it within the terms of the Act, and we will then let the cases stand over to permit notice to be served.

“There is another matter to be observed. The language of the 60th section refers to the first occasion on which the Court sits; the first occasion—not the first day. We have the power to define the limits of any particular sitting of our Court, and

during the second sitting to adjourn from day to day in the ordinary way. We have made an order providing that the present sitting shall last until Saturday, the 29th October, inclusive (1); and any application which may be made on this day may be made on any day during that period. So that, as these words of ours are certain to make their way through the Press to every part of Ireland, no one can say with justice that his rights have been lost by any want of care on our part to preserve them. If they are lost, it must be by the tenant's own deliberate choice. When we speak of the loss or forfeiture of rights, we repeat, in order to avoid the slightest chance of misapprehension, that we refer to the right of tenants evicted for non-payment of rent since the 22nd of February, 1881, or for any other cause since the 22nd of August, and also of the right which a tenant acquires by making an application for a judicial rent at this sitting, to have said rent, when fixed, regulate any gale that has accrued since the 22nd of August.

“With respect to any other rights than those I have specified, the omission to make application at this sitting entails no loss or forfeiture. A tenant may take no step whatever at present. He may continue in his holding subject to his existing rent, and he may nevertheless come in at any time hereafter to have a fair rent fixed from that time forth. There is no compulsion whatever on the tenant to come into Court. He is left perfectly free. The landlord, it is true, may on his side seek to have a fair rent fixed; but he can only do so after having demanded an increase of rent, or otherwise failed to come to an agreement with the tenant. We have hitherto spoken merely of the action of the Court in determining a fair rent. The other valuable privileges conferred by the Act—the power given to a tenant to purchase his holding, or obtain a grant in fee-farm by means of a loan from this Commission—these privileges, which we trust to see largely taken advantage of, do not require to be dwelt upon by us at present.”

(1) This period has been subsequently extended to Saturday, Nov. 12th, inclusive.

The Land Commission Reports.

REPORTS OF CASES

DECIDED BY

THE IRISH LAND COMMISSION

(MR. JUSTICE O'HAGAN; MR. COMMISSIONER LITTON, Q. C.; AND
MR. COMMISSIONER VERNON).

OCTOBER 21, 1881.

BALDWIN v. HEAS.

Practice—Sale of tenancy by execution creditor—Substitution of service of notice of sale—Costs—L. L. (Ir.) Act, 1881, sect. 1, sub-sect. 14, Rules, Form No. 13.

The Court will, on affidavit satisfying it of the difficulties of service of notices of intention to sell holding by execution creditor (Form No. 13), substitute service of same, but will not grant the costs of such *ex parte* applications. *Semble*, that costs of such application may be recovered on taxation as part of the necessary costs of realising the debt.

MOTION to substitute service of a notice of intention to sell holding by execution creditor (Form No. 13 in the Rules). The affidavit of Plaintiff's solicitor set out that judgment had been recorded by Plaintiff in an action for rent, and that owing to the lawless state of the district it had been found impossible to effect service of the notice of sale.

Shannon, for the Plaintiff.

THE COURT made the order for substitution of service by letter, and posting on the nearest Petty Sessions Court-house.

Shannon applied for costs, and asked the Court to certify for counsel's fee.

O'HAGAN, J.—Against whom do you ask for costs?

Shannon.—Against the Defendant the tenant. The principle is the same, whether the landlord or another is the execution creditor. At page 76 of the Rules in the Schedule of Fees it is laid down—

“For all proceedings consequent on a tenant's notice of his intention to sell his tenancy, where an originating notice is served, from the first originating notice up to and including the payment and distribution of the purchase-money, where the rent of the holding mentioned in the tenant's notice of intention to sell does not exceed £5, £1 0 0

“Where such rent exceeds £5, and does not exceed £15, 2 0 0

“Where the rent exceeds £15, and is under £50, . . . 3 0 0

“Where rent exceeds £50, 5 0 0

“The above scale shall likewise apply in case of sale by an execution creditor, assignee in bankruptcy, personal representative, or other person selling the tenancy.”

O'HAGAN, J.—I think the application to make the tenant pay these costs is unsustainable.

Shannon.—You have full power to give costs, for the costs are provided for in the Rules.

LITTON, Q. C.—Why cannot you recover your costs as part of your judgment debt?

Shannon.—We would not be allowed them as costs in the cause.

LITTON, Q. C.—It is part of the necessary costs of realising your demand.

Shannon.—You should follow the analogous rules of the Superior Courts.

O'HAGAN, J. :—

We cannot certify for costs in a case where the opposite party is not here. You must wait till after the sale, when you come to levy the costs ; you may perhaps recover them if the Taxing-officer allows them.

OCTOBER 25, 1881.

SEMPLE v. HUNTER AND WIFE (REVISED).

Jurisdiction—Application to restrain landlord from enforcing an ejectment decree—Notice to fix fair rent.

The Court has no power to restrain a Plaintiff from executing an ejectment decree obtained in the County Court pending a notice to fix a fair rent ; such application, if tenable, should be made to the County Court under sect. 13, sub-sect. 3, L. L. (Ir.) Act, 1881.

THIS was a notice served on the landlord by the tenant, in the following terms :—" I apply to the Land Commission for an order restraining you from taking further proceedings to enforce the decree in ejectment, dated the 12th day of July, 1881, which you have obtained against me, pending the hearing of my application to fix the fair rent of my holding, of which notice has been served on you." An originating notice to pay fair rent was also served. The facts of the case, which are fully set out in the judgment of MR. JUSTICE O'HAGAN, were shortly as follows :—The tenant held, as tenant from year to year, from Mrs. Bryson, the mother of Mrs. Hunter, the landlady ; on the death of Mrs. Bryson, on the 4th of April, 1881, Mrs. Hunter became entitled to the estate of Mrs. Bryson. On the 12th of July, 1881, Mrs. Hunter obtained a civil bill decree in ejectment on the title against the tenant, with stay of execution until the 1st of November, 1881. At the time of the ejectment there was a crop in the land, and the lands were held at a rack-rent.

Kisbey, for the tenant.—The real question is, whether we have a right to have a fair rent fixed.

The tenant has a right, in lieu of emblements, to continue to hold until the last gale-day of the current year: Landlord and Tenant Act, 1860, sect. 34.

The landlord would have a right to distrain for the rent coming due in November: *Haines v. Welch & Marriott* (1). So that the relation of landlord and tenant continues, and we have our rights under the L. L. (Ir.) Act, 1881.

We do not ask you to restrain another Court; the Civil Bill Court has given its decree. This Court has full equitable power, under sect. 48, sub-sect. 3, to restrain these proceedings.

Dodd, for the landlord, contended that there was no jurisdiction to restrain the Civil Bill Court.

He also contended that the tenancy was absolutely determined by the decree on the 12th of July.

Cur. adv. vult.

The judgment of the Court was delivered (Oct. 27) by

O'HAGAN, J.:—

In this case an application has been made by T. Semple to restrain Hunter and wife from taking further proceedings to enforce the decree in ejectment, dated the 12th July, 1881, pending the tenant's application to fix the fair rent of his holding. In support of this motion an affidavit has been made by the tenant, on the 18th October, 1881. An affidavit in opposition to the motion has been made by the landlords on the 22nd October. The facts appear to be these:—The holding consists of the lands of Kilbride, in the county Antrim, containing 14 acres, statute measure. The lands were formerly in the occupation of Samuel Bryson, who held them for some free hold interest, but who, so far as appears, farmed them himself. By his will, dated the 10th of June, 1866, he bequeathed them to his wife during her life, by the description of his "farm, with

stock, implements," &c. After her death he directed a division to be made between his son John James, now deceased, and his daughter Jane Bryson, now Jane Hunter, in a manner immaterial to specify. He died on the 1st September, 1866. His son John James died in the lifetime of his mother, the tenant for life, leaving his sister Jane his heiress-at-law. Thomas Semple, in November, 1866, became tenant to the lands under Mrs. Bryson, at the yearly rent of £27, payable annually on the 1st November. He asserts that before he became such tenant, Mrs. Bryson and her daughter Jane, then adult and unmarried, promised him a lease for the lives of both. This is absolutely denied by Jane, the present Mrs. Hunter, so far as she is concerned; and I need only say that if Semple was in a position to establish the fact that he took possession on the faith of any such contract, it would not only form a defence to an ejectment brought during the life of Mrs. Hunter, but would enable him in equity to have a lease executed to him according to the agreement. Semple continued to hold during the life of Mrs. Bryson, who died on the 4th April, 1881. In December, 1880, he paid to Mrs. Bryson the rent which had accrued in the previous November. Jane Bryson, the testator's daughter, had in her mother's lifetime married James Hunter, and after her mother's death she and her husband, claiming to be entitled to the lands in right of Jane, as devisee under her father's will and heiress-at-law of her brother, brought an ejectment in the Civil Bill Court of the county Antrim against Semple. This ejectment was brought under what is termed the "title jurisdiction" of the County Courts, conferred upon them by the Act of 1877. This ejectment came before the County Court Judge of the county of Antrim, and he made his decree on the 12th July, 1881, with a stay of execution till the 1st of November, 1881. On the 14th November, 1881, Semple served on Mr. and Mrs. Hunter an originating notice to fix a fair rent for the holding, and this has been followed by the notice at present before us, seeking to restrain the Hunters from enforcing their decree. Mr. Kisbey, who argued the case very ably for the tenant, urged that the right to

restrain the Hunters from executing their decree existed in this Court, as ancillary to and flowing from the right to fix a fair rent; and he contended that the right to fix a fair rent, under the circumstances I have stated, was given by the 13th section of the Land Law (Ireland) Act, 1881; and in support of his contention he relied strongly on the 34th section of the Landlord and Tenant Act of 1860—what is usually termed the emblement section. Now, as to the present application itself, we are unanimously of opinion that it cannot be granted. We find no power conferred on us by the Act to restrain the execution of the decree; and it seems plain to us that if any such application be tenable, it should be made, under the 3rd sub-section of the 13th section, to the County Court, as being the Court before which the proceedings are pending. But there lies behind the very important question, whether the right to sell the tenancy or to have a fair rent fixed exists in this case. This is a question upon which we are not at present in a position to adjudicate. According to the practice which we have established, the case will go down in the ordinary course to be tried by a Sub-Commission on the spot. The evidence will be taken *viva voce*, and the Sub-Commission will then determine whether, in the present case, Semple is within the provisions of the 13th section. From their decision there will be an appeal to us. If both parties desire it, in order to save the expense of a hearing, and possibly of an appeal, we are quite willing to decide the question upon a Case Stated between the parties; but we are clearly of opinion that, upon this interlocutory motion, and upon affidavits containing controverted statements, and possibly not disclosing all the facts, we have no right to decide the substantial question at issue. Semple must pay the Hunters £3 for the costs of this motion.

MR. COMMISSIONER LITTON, Q. C., concurred.

KNIPE *v.* ARMSTRONG (REVISED).

Jurisdiction—Transfer of land claim for compensation for disturbance and improvements under the L. & T. (Ir.) Act, 1870, to the Land Court—L. L. (Ir.) Act, 1881, sect. 37, sub-sects. 3 and 4.

A claim under the L. & T. Act, 1870, for compensation for disturbance, improvements, and payment made by the incoming tenant, will not be transferred from the County Court to the Land Court, under sect. 37, sub-sects. 3 and 4 of the L. L. (Ir.) Act, 1881. "Land claims which commonly attend on and are incident to ejections are exclusively within the jurisdiction of the Civil Bill Court as the Court of first instance"—*per* MR. COMMISSIONER LITTON, Q. C.

MOTION to transfer to the Land Court, under sect. 37, sub-sects. 3 and 4 of the L. L. (Ir.) Act, 1881, a land claim which was originated before the Chairman for the county Armagh. The claim was under the Ulster custom, and in the alternative for compensation for improvements, disturbance, and for payments made by the incoming tenant.

Overend, for the tenant.—The question raised here is whether the Chairman's Court or the Land Court has exclusive jurisdiction. In the Rules and Orders no provision has been made for filing a claim under the Act of 1870. If the tenant is limited to making this claim in the Court below, he will then have to come before this Court, as a Court of Appeal.

Sect. 57 of the L. L. (Ir.) Act, 1881, in the concluding paragraph runs as follows: "Any words or expressions in this Act which are not hereby defined, and are defined in the L. & T. (Ireland) Act, 1870, shall, unless there is something in the context of this Act repugnant thereto, have the same meaning as in the last-mentioned Act; and the L. & T. (Ireland) Act, 1870, except in so far as the same is expressly altered or varied by this Act, or is inconsistent therewith, and this Act shall be construed together as one Act." In the Act of 1881 almost every section by direct or implied reference brings in the Act of 1870.

By section 6 of the Act of 1881 the amount of compensation is increased. Section 7 goes into matters declaratory of the law on the subject.

The word *Court* is used in this section as dealing with compensation. Section 40 deals with arbitration under the Act of 1870.

Sub-sections 3 and 4 of section 37 of the Act of 1881 are applicable directly to such a claim as the present.

Sub-section 3 enacts: "Any proceedings which might be instituted before the Civil Bill Court may, at the election of the person taking such proceedings, be instituted before the Land Commission; and thereupon the Land Commission shall, as respects such proceedings, be deemed to be the Court."

Sub-section 4 enacts: "Where proceedings have been commenced in the Civil Bill Court, any party thereto may, within the prescribed period, apply to the Land Commission to transfer such proceedings from the Civil Bill Court to the Land Commission, and thereupon the Land Commission may order the same to be transferred accordingly."

Weir, for the landlord.—Even if the Court had jurisdiction, the Plaintiff should not be allowed to change a forum which he has himself selected, and which has ample jurisdiction. This Court has no original jurisdiction to dispose of claims under the Act of 1870; the only jurisdiction you have is an appellate jurisdiction. The Court is defined by sections 22, 24, and 25 of the Act of 1870. In the Act of 1881 there is no formal incorporation of the Act of 1870.

Section 57 of the Act of 1881 is limited in terms, in so far as it deals with the Act of 1870.

Sections 6, 7, 38, and 47 of the Act of 1881 provide for various changes to be made in the Act of 1870.

Section 37 of the Act of 1881 does not give original jurisdiction to this Court. If such a construction as the Plaintiff seeks be put on this section, there is no limit to your jurisdiction, and you may have an ordinary civil bill transferred to this Court.

O'HAGAN, J. :—

If in this case we entertained any doubt as to the correctness of the decision we have come to, we would reserve our judgment; but we are unanimous in thinking that the application should be refused.

It is contended by Mr. Overend that we have power under sect. 37, sub-sect. 4, of the Act of 1881, to transfer from the Civil Bill Court to this Court a proceeding not to obtain any of the benefits given by that Act, but to obtain compensation for disturbance under the Act of 1870. In other words, that this Court has jurisdiction, as a Court of first instance, to award compensation to a tenant for disturbance or improvements. To this we cannot accede. We take it to be a primary principle, that where jurisdiction is conferred on a newly-created tribunal, it must be given in express terms. We must, therefore, see whether there are any words in the Act of Parliament which confer it upon us. Mr. Overend was obliged to admit that express words there are none; but he contends that the jurisdiction follows by necessary implication from the terms of the Act. He says that we must take the words of the 37th section in connexion with the concluding words of the 57th section; that we must look upon the Act of 1870 and the Act of 1881 as forming one Act; and so blended that whatever jurisdiction is given to the Judge of the County Court by the Act of 1870 may now be exercised by the Land Commission, either upon being originally selected, or by making an order for transfer from the County Court. It appears to us that the sections in question, as well as the whole frame of the Act, are quite irreconcilable with Mr. Overend's contention. The distinction is drawn throughout between the Act of 1870 and the Act of 1881, the latter being uniformly termed "this Act." And where any jurisdiction is given to the Land Commission it is given in express language.

Sub-sect. 5 of sect. 37 says:—"The Court shall have jurisdiction in respect of all disputes between landlords and tenants arising under this Act." This is followed by sect. 38, which says: "There shall be incorporated with this Act the following provisions of the Landlord and Tenant (Ireland) Act, 1870, as

if the purposes therein referred to included the purposes of this Act." The section then sets out the various provisions of the Act of 1870 which are incorporated. Nothing could be clearer to show the distinction that was drawn between the Act of 1870 and this Act. Again, sect. 57 says: "Any words or expressions in this Act which are not hereby defined, and are defined in the Landlord and Tenant (Ireland) Act, 1870, shall, unless there is something in the context of this Act repugnant thereto, have the same meaning as in the last-mentioned Act; and the Landlord and Tenant (Ireland) Act, 1870, except in so far as the same is expressly altered or varied by this Act, or inconsistent therewith, and this Act shall be construed together as one Act." We do construe them together as one Act; but where the Act of 1870 confers jurisdiction on the Civil Bill Court we cannot, on any principle of construction, say that the jurisdiction is also conferred on this new tribunal merely because the Acts are to be read together. We thought the question clear at the time we framed the Rules; and as the attention of the mover of this motion was called to the opinion we entertained, and he still elected to go on, we refuse the motion with costs.

MR. COMMISSIONER LITTON, Q. C. :—

I concur in the judgment of MR. JUSTICE O'HAGAN. The matter is not one altogether new to us, for we had to consider the question when preparing the Rules. I am glad, however, that the point has been so fully and so ably argued, as it is one of considerable importance, and it was very desirable that a decision should be come to at the earliest possible moment. The result of the argument has been to confirm the opinion we entertained—that land claims, which commonly attend on and are incident to ejectments, are exclusively within the jurisdiction of the Civil Bill Court, as the Court of first instance. There is considerable force in the argument of Mr. Weir, that all these cases should be tried in the Court that tries the ejectments. This Court cannot entertain an action of ejectment. I think the plain construction of the 37th section of the statute, where it speaks of "proceedings which might be instituted

before the Civil Bill Court," is, that reference is made to proceedings under *this Act*. Sub-sect. 5 confers jurisdiction in respect of all disputes under *this Act*. If, then, we take this sub-section in connexion with sect. 38, which incorporates certain sections (eight in number) of the Act of 1870, and regard the clear intention, manifest throughout the Act, not to incorporate all the provisions of the Act of 1870, we cannot but conclude that land claims are not within our jurisdiction except as a Court of Appeal. We would, I fear, find ourselves forced to certain conclusions upon other important questions, which I am not prepared to accept, were we bound to decide in accordance with the construction sought to be placed on this section. We ought not to assume a jurisdiction which is not clearly given to us. I concur in the judgment of the Court.

OCTOBER 26, 1881.

LAWLER v. MOORE.

Practice—Defence by landlord to application to fix fair rent—Town-park—Section 58 L. L. (Ir.) Act, 1881—When defence should be raised.

If a landlord seeks to plead, as a defence to an application to fix a fair rent, that the tenancy is a town-park within section 58, sub-sect. 2, of the L. L. (Ir.) Act, 1881, such defence should not be raised till the case comes on for hearing before the Sub-Commission.

APPLICATION on behalf of the landlord, on whom an originating notice to fix a fair rent had been served, for directions of the Court as to how the defence of the tenancy being a town-park, within sect. 58, sub-sect. 2, of the L. L. (Ir.) Act, 1881, should be raised.

Mr. Davis, solicitor for the landlord, contended that the point as to whether the tenancy was a town-park or not should be tried before the case was sent before the Sub-Commission.

O'HAGAN, J. :—

We abolished pleadings for the purpose of allowing every defence, legal or equitable, to be raised before the Sub-Commission. The question whether the tenancy is or is not a town-park is one of fact, and must be tried before the Sub-Commission *ore tenens*. If it is, it does not fall within the Act, and you will succeed.

OCTOBER 27, 1881.

MARSH v. MORELAND, A MINOR.

Practice—Originating notice served on a minor—Necessity of appointing a guardian—Power of Court to appoint guardian—L. & T. (Ir.) Act, 1870, sect. 61—L. L. (Ir.) Act, 1881, sect. 38. sub-sect. 5.

IN this case an originating notice to fix a fair rent had been served on the landlord, who was a minor, as stated in the notice.

Mr. Barry, solicitor for the tenant, moved to have the application to fix a fair rent recorded as of the date of the first occasion of the sitting of the Court.

O'HAGAN, J. :—

We cannot make an order at present in this case, because the landlord being a minor, service upon him *quâ* minor would be a nullity. If he has no guardian we will exercise the jurisdiction given to us by the Act of 1870, and appoint a guardian. Our jurisdiction to appoint a guardian is based on sect. 61 of the Act of 1870, which is incorporated by sect. 38, sub-sect. 5, of the Act of 1881. But we must first know whether there is already a guardian or not; we must then see who it is is proposed to be the guardian, and then the minor can be served through his guardian.

NOVEMBER 3, 1881.

IN a similar case—In re Mauleverers, Minors,—MR. COMMISSIONER LITTON, Q. C., held that the names of the minors must be given, and the fact of there being a guardian must appear by affidavit.

OCTOBER 28, 1881.

HOWARD v. REPRESENTATIVES OF MRS. CATHERINE
CONWAY.

Practice—Landlord not known—Necessity of specifically naming landlord in originating notice.

An originating notice must state specifically the name of the landlord ; a statement naming "*the representatives*" of a deceased person as landlord is insufficient.

APPLICATION to fix a fair rent. The originating notice was entitled "Michael Howard, tenant; the Representatives of Mrs. Catherine Conway, landlords." It appeared from the statement of Mr. William Smith, solicitor for the tenant, that the former landlady, Mrs. Catherine Conway, had died some time prior to the passing of the Act; that Mr. St. Lawrence was agent of the estate, but the tenant had paid no rent to him; and that the tenant had received a written demand for rent from Henry White, who stated he was personal representative of Mrs. Conway; but on the tenant demanding how he was representative of Mrs. Conway, he received no reply.

O'HAGAN, J. :—

There must be an opposite party. You ought to serve a new originating notice, naming Mr. White as landlord. But if Mr. White is not the landlord, you can get no benefit of it.

As to naming vague parties, and calling them representatives of a deceased party, you cannot do it. If a person be an agent of the landlord's, and receive the entire rent, then it will be sufficient to name some one person as landlord, but at the hearing the names of all the landlords must appear.

M'CLOSKEY v. JOHN COOK AND JOSEPH COOK.

Practice—Service of originating notice—Where there are more than one landlord, service on all necessary.

IN this case there were two landlords named in the originating notice to fix a fair rent, but only one had been served; the Court directed the other landlord to be served also, service on one part owner not being good service as against the other.

NOVEMBER 2, 1881.

COOPER v. DUIGENAN.

Application to set aside a lease, and fix a fair rent. Fair rent cannot be fixed till lease be set aside: sect. 21 L. L. (Ir.) Act, 1881.

ON an application to record an application to fix a fair rent, the tenant holding under lease, which he also proposed to set aside, the Court refused to record the application to fix a fair rent till the lease was set aside. Nov. 3, MR. COMMISSIONER LITTON, Q. C., sitting in Chamber, refused a similar application to record the application to fix a fair rent. The tenant must first proceed to set aside the lease, and then he holds at the rent under the lease; he can then apply to have a fair rent fixed. An application to fix a fair rent before setting aside a lease is irregular, and may be set aside by the opposite party.

NOVEMBER 4, 1881.

GERING v. D'ARCY.

THIS was a similar application, under sect. 21 L. L. (Ir.) Act, 1881, to set aside a lease, and also to fix a fair rent.

Sherlock, for the tenant.—An application made now will have the same effect as if made on the day the Act became law, and consequently, if the lease be set aside, it will be necessary to re-adjust the rent, and the tenant will then only be under the same rent as if the application was made and the order pronounced on the day of the passing of the Act.

O'HAGAN, J. :—

If you set the lease aside, the effect will be that you will be a tenant at the old rent till you have a new one fixed. You will have to commence proceedings to fix a new rent if the lease be set aside. At present you are not an ordinary tenant within the meaning of the Act, and you will not till an order is made setting aside the lease.

NICOLL v. BOURKE.

*Question of disputed fact—Equitable right to a lease—Unexecuted lease—
Trial before Sub-Commission.*

The Court will not decide on affidavit a question as to whether a tenant is or is not a leaseholder, and as such exempted from the Act, not being an ordinary tenant; such question should be tried *vivâ voce* before the Sub-Commission.

APPLICATION on behalf of the landlord that this case should not be sent down to be tried by the Sub-Commission until this Court has decided whether the tenant was an ordinary tenant within the meaning of the Act. It appeared from the affidavit

of the landlord that the tenant held the farm under a lease made in 1861, for a term of twenty-one years, which were still unexpired. The lease was made between the father of the present tenant and the landlord. The lease and counterpart both remained in the possession of the tenant, and the landlord only recently discovered that neither had ever been actually executed. On the faith of the lease, certain improvements were made by landlord.

W. Kenny, for landlord, contended that this state of facts constituted an equitable lease, the term of which was unexpired.

O'HAGAN, J. :—

This case must go before the Sub-Commission. It is a question of disputed facts, upon which it will be necessary to hear witnesses *vivâ voce*.

NOVEMBER 8, 1881.

A. AND J. MEARES v. W. C. HERON.

Bankruptcy of tenant—Absconding bankrupt—Intention to sell by assignee in bankruptcy—Notice to tenant dispensed with—L. L. (Ir.) Act, 1881, sect. 1, sub-sect. 14—General Rule 87—Form No. 17.

In case of a bankrupt tenant absconding and his assignees being desirous of selling his holding, if his address be not known, the Court will dispense with service on such bankrupt tenant of the notice of intended sale required by General Rule 87.

MOTION to substitute service of the notice (Form No. 17) required by General Rule 87. In this case the tenants held three farms in the Co. Down. The originating notice named as tenants, along with A. and J. Meares, Charles H. James, Lucius Deering, and Robert Skelly, being the assignees in bankruptcy of A. and J. Meares, who were bankrupts. The affidavit of Robert Skelly, creditors' assignee, set out that the total liabilities were £1078 and the assets £620, of which £578 was stated by the tenants to be the value of their interest in the farms; this estimate was stated by the assignees to be greatly in excess of the real value. Since the filing of the statement of affairs the bankrupts had absconded, and their address was unknown to the assignees. The originating notice was served on the landlord, and the landlord served the assignees with notice, by which he consented to allow a person who had sent in a tender to become the purchaser of the interest of the tenant, and he also waived the right of pre-emption which he had under the Act. He applied to the Court of Bankruptcy to carry out the sale; but the Court felt itself coerced by the 87th General Rule to effect some service on the tenant, and felt that the Bankruptcy Court was not the tribunal to direct service, under the circumstances, and directed application to be made to the Land Commission.

George Perry, for the assignees.—Section 1, sub-sect. 14, of the L. L. (Ir.) Act, 1881, provides that the sale shall be made "in the prescribed manner." This is, in consequence, prescribed

as follows in General Rule 87 : " Where the sale takes place by the assignees in bankruptcy of the tenant, or by a person having carriage of sale of the tenancy under the order of any Court, the assignees, or the person having carriage of the sale, shall give notice to the landlord and tenant of the intended sale, which notice may be in Form No.-17 ; and thereupon the landlord shall, within one fortnight from receipt of the notice, if he desire to purchase the tenancy, serve notice of application to the Court to ascertain the true value thereof, which notice may be in Form No. 14, and shall be served on the tenant, the person selling, and the Clerk of the Peace or the Land Commission, as the case may be."

The obvious construction of this Rule is, that the bankrupt remains the tenant, as distinguished from the assignees.

O'HAGAN, J.—Yes, he remains a tenant for the purpose of notice.

Perry.—I have no intention of reviewing this order, but it is not within the spirit of the Bankruptcy law, which vests all the property in the assignees. The case is a pressing one, as the offer to purchase one of the farms may be withdrawn at any moment.

O'HAGAN, J.:—

We are all of opinion that, under the facts which appear in this case, service of the notice on the tenant, pursuant to General Rule 87, may be dispensed with.

NOVEMBER 10, 1881.

BAILLIE v. MONTGOMERY (REVISED).

Inconsistent claim of tenant—Application to enlarge time to redeem or sell, without prejudice to right to be considered a present tenant, and have a fair rent fixed.

A claim on behalf of a tenant to extend the time for redemption or sale, without prejudice to the right to be considered a present tenant under the

L. L. (Ir.) Act, 1881, and have a fair rent fixed, will not be entertained, such claim being inconsistent with his position as a present tenant.

APPLICATION on behalf of the tenant, under sect. 13, subsect. 2, of the L. L. (Ir.) Act, 1881, to enlarge the time to redeem his tenancy, or to sell his interest, without prejudice to his right to be considered a present tenant under the Act of 1881.

The affidavit of the tenant, David Baillie, stated that he held, at Kirkstown, in the Co. Down, 73 statute acres, at a rent of £115 10s. The poor-law valuation was £81. On the 8th of March, 1881, he was evicted for non-payment of rent, and remained out of possession till the 5th of May, 1881, when (according to his affidavit) he, on the authority of Mr. J. B. Atkinson, the landlord's agent, went back into possession, and subsequently worked the farm in the ordinary way, and was told by Mr. Atkinson to endeavour to pay a year's rent in December next, and afterwards arrange with the landlord as to the arrears. He was prepared to pay the year's rent in December, but in September he was served with a writ of summons claiming possession, treating him as an overholding tenant. The time for redeeming expired on the 8th of September. On the 12th of October, he served on the landlord an originating notice to have a fair rent fixed.

The affidavit of the agent of the landlord, Mr. Atkinson, contradicted the statement that he allowed Baillie to re-enter, and asserted that he took forcible possession. Baillie owed three years' rent in 1880, and undertook, when judgment was obtained against him in ejectment, to pay £200 off the rent if the *habere* was not executed. He never paid any part of the rent, but twice took crops off the farm.

Shaw, for the tenant.—Whether Baillie be a present tenant or not depends on what passed between him and his landlord's agent. Baillie swears to one state of fact, Mr. Atkinson swears to another. It may be decided he is not a present tenant. Then the right to redeem would arise.

Weir, for the landlord.—The case set up by the tenant to claim the right to redeem under sect. 13, sub-sect. 2, is inconsistent with his claim to be considered a present tenant, and have a fair rent fixed as such.

O'HAGAN, J.:—

In this case we have no power to extend the time for redemption unless the tenant be an evicted tenant. But if under an agreement made in May last, a new tenancy was constituted, then he is a present tenant and not a tenant under eviction; we cannot deal with purely speculative rights. An order based upon a conjecture as to what may turn out hereafter to be the rights of the parties would be an absurdity. In this case the tenant owed three years' rent, and judgment in ejectment for non-payment of rent was obtained against him in the course of last year. On the 8th of March in the present year he was actually evicted. He did not redeem within the six months allowed by law, and if upon that case simply he came in here seeking the benefit of the 60th section conjointly with the 13th section, and asking for an extension of time to redeem and sell, we would have considered the merits of the case, and possibly we might have acceded to the application on such terms as we deemed just. But the tenant swears that on the 5th of May, 1881, he was put back into possession, and told by the agent to prepare to pay a year's rent next December; thus, if he is correct in this statement, constituting a new tenancy. The landlord's agent, however, denies that anything of the kind took place. An ejectment on the title was brought in September, 1881. The tenant defended the ejectment, and called for a statement of claim. He then, in the character of a present tenant, served an originating notice to have a fair rent fixed for his holding. The tenant is perfectly within his rights in both respects. He had a right to defend the ejectment if the new agreement which he relies on was really come to. He has a right, on the same supposition, to go before the Sub-Commission, to have a fair rent fixed. But now he comes before us, seeking for an extension of time to redeem his holding, on the ground that he is not a pre-

sent tenant, but is still under eviction, and was in fact an evicted tenant on the 22nd of August last, when the Act passed. No tribunal could permit any person at the same time to assume two such perfectly distinct and antagonistic characters. Mr. Shaw ingeniously put it, that though his client claims to be a present tenant, yet it may turn out that he is not, but is in fact an evicted tenant, and he asks whether he is in that case to be deprived of the benefit of the 13th section? I reply that he certainly is. We are not to speculate on what may turn out to be the true state of facts. The tenant is here before us endeavouring to assume two totally distinct, and as we conceive, irreconcilable characters. In such a case he must make his election; and as he has chosen to take the position of a present tenant before the Sub-Commission, we cannot now treat him as an evicted tenant. I say nothing as to the conduct of the tenant sworn to by the agent; we deal with him on the case made by himself.

MR. COMMISSIONER LITTON, Q. C. :—

I do not think the matters disclosed in this case warrant encouragement or approval of the course adopted by the tenant. In seeking consideration from this Court, the conduct of the applicant must be fair and honest as between man and man: it must not be, as the Act mentions, "unreasonable." Three years' rent are due to the landlord, and it is stated that the crops were sold in these three years, and nothing paid to the landlord. So far as the merits go, therefore, they do not appear to be with the tenant. But apart from that, it is clear that the tenant occupies, so far as this motion is concerned, two distinct and perfectly inconsistent positions. We must, therefore, refuse the motion. I do not think it necessary to add anything to the reasons given by MR. JUSTICE O'HAGAN for the judgment of the Court. I merely state that I entirely concur in it.

IN RE COLONEL VANDELEUR.

Death of landlord served with originating notice—Necessity of re-service on his representative.

IN the case of Colonel Crofton Vandeleur, landlord, a number of originating notices had been served on the landlord on behalf of tenants to fix a fair rent; Colonel Vandeleur died subsequent to the service. The Court refused to record an application to fix a fair rent as against the deceased, and directed the son and heir-at-law of the deceased to be served if the tenants desired to proceed. The whole proceedings must be commenced *de novo*.

NOVEMBER 12, 1881.

MARSH *v.* MORELAND (No. 2).

Extension of time to redeem—Sect. 13, sub-sect. 2, L. L. (Ir.) Act, 1881—Period from which time for redemption runs—Renewal of decree for possession—Illegal execution of original decree—27 & 28 Vict. c. 99, s. 44.

Where a decree for possession was obtained and executed, and the tenant re-entered unlawfully, and a renewal of the decree was obtained, the period for redemption was held to run from the date of the execution of the original decree; and as this was more than six months prior to the date of the passing of the L. L. (Ir.) Act, 1881, the tenant was exempted from its benefits.

APPLICATION under sect. 13, sub-sect. 2, of the L. L. (Ir.) Act, 1881, to extend the time for redemption. The facts, as appeared from the affidavits, were as follows:—On the 25th of March, 1880, a year and a-half's rent was due by the tenant to the landlord. On the 15th of April, 1880, a decree for possession for non-payment of rent was obtained by the landlord. On the 25th of May, 1880 (the tenant alleged at 4 p.m.), the sheriff took over possession, and a few days afterwards the tenant retook possession and overheld, without paying any rent. The

tenant was twice summoned for the trespass, and on two separate occasions fined 10s. A third summons was discontinued, on the ground that the trespass was a continuing one, as the Plaintiff alleged, but, according to the tenant's allegation, on the ground that the original execution was illegal. A renewal of the original decree was obtained, and executed on the 18th of April, 1881.

Shannon, for the tenant.—The period of redemption must commence to run from the date of the execution of the renewal, which brings us to 18th of April, 1881, and the period so falls within the statute.

By 27 & 28 Vict. c. 99, s. 19, the decree must be executed between 9 A.M. and 3 P.M. It is admitted here that the original decree was executed at 4 P.M.; that renders the original execution of the decree illegal, and therefore null and void, and thus the time should run from the execution of the renewal.

John Roche, for the landlord.—The renewal order of the original decree was obtained under 27 & 28 Vict. c. 99, s. 44, which enables the County Court Judge to renew an ejectment for non-payment of rent when possession has been taken within six months. This can only be obtained because there was an "unlawful" re-entry on the farm after the execution of the decree. The renewal of the decree recites that it was issued because of the unlawful re-entry; and such recital on the order acts as an estoppel against the tenant, and prevents him denying the re-entry was illegal.

Shannon.—The Court must decide how far the recital on the renewal acts as an estoppel.

O'HAGAN, J.:—

It is the Act of Parliament that makes the estoppel. It is legally a condition precedent to the granting of a renewal of a decree, that there was a lawful execution of the former decree, and an unlawful taking of possession. We must hold that the original decree in this case was lawfully executed, and that pos-

session was taken unlawfully. The time for redemption, therefore, runs from the 25th of May, 1880; and the time having expired, the tenants are outside the law.

Motion refused, with £3 costs.

NOVEMBER 17, 1881.

SWEENEY *v.* CARTER.

Witness to agreement between landlord and tenant—General Rule 100.

The provisions of General Rule 100, requiring an agreement between a landlord and tenant fixing a fair rent to be witnessed, as regards the tenant's signature thereto, by a clergyman, solicitor, Commissioner for taking Affidavits, Justice of the Peace, or a poor-law guardian, must be strictly carried out, even if no such person can be conveniently procured.

APPLICATION on behalf of the tenant to dispense with the necessity of procuring as a witness to the tenant's signature to an agreement to fix a fair rent a clergyman, solicitor, Commissioner for taking Affidavits, Justice of the Peace, or poor-law guardian, as required by General Rule 100. It was proposed to substitute a head-constable of constabulary for such person. The place of the tenant's residence was about fifteen miles from Belmullet, in the Co. Mayo, on the borders of the Atlantic, in a very remote district, and there were no such persons resident there as required by the Rule.

LITTON, Q.C.—The object of this Rule was to throw the greatest possible protection over the tenant. He might have been coerced or led maladviseedly into signing a contract of this kind.

O'HAGAN, J. :—

We cannot relax the Rule.

LIMERICK SUB-COMMISSION.

STACK v. PLUMMER (1).

Tenancy taken in execution by sheriff—Conveyance to purchaser executed by sheriff after the passing of the L. L. (Ir.) Act, 1881—Application by tenant to fix a fair rent.—L. L. (Ir.) Act, 1881, sect. 13, sub-sect. 3—Sect. 57.

Where a tenancy from year to year was taken in execution by a sheriff, prior to passing of the Act, and a conveyance by the sheriff to a purchaser of the lands was executed subsequent to the passing of the Act, such tenant has lost his tenancy, and falls outside the Act.

APPLICATION to fix a fair rent.

D. B. Sullivan, for the tenant.

Atkinson, Q. C., for the landlord.

[The facts fully appear in the judgment.]

MR. ASSISTANT-COMMISSIONER REEVES, Q. C., delivered the judgment of the Court :—

In this case counsel for the tenant admitted that, on August 19th, 1881, the tenancy from year to year was taken in execution by the sheriff under a *fi. fa.* and sold, but the conveyance to the purchaser was not executed until the 20th of September, 1881, that is, long after the passing of the Land Act; and it was contended by Mr. Sullivan that, under these circumstances, the tenants are tenants within the Act, and entitled to apply to the Court to fix a fair rent. I cannot concur in that argument. The Act of Parliament defines a tenant as a person occupying land under a contract of tenancy. It is true that here Mr. Sullivan's clients are in possession, but are they in possession as tenants? The effect of a sale by the sheriff under a *fi. fa.* of a term of years as a tenancy from year to year is to make the purchaser the beneficial owner; and although it is quite true that the legal estate

does not vest in him until the execution of the conveyance by the sheriff, yet the equitable interest is in him; and as counsel for the landlord said, on the execution of the conveyance the title relates back. Before the conveyance, the former tenant has the legal estate, while another person is interested in the equitable interest; and I can see no difference in this case from one in which the tenant had entered into an agreement to sell his tenancy, had received the purchase-money, and was still in possession. Clearly the person to come in and apply to the Court to fix a fair rent would be the person to whom it was sold. But Mr. Sullivan in his very fair argument called my attention to another important question under the 13th section:—The principal part of the section makes regulations giving the benefit of the Act to certain tenants who have been proceeded against by their landlords, either for non-payment of rent or by ejectment on the title, and making provisions enabling them to sell the tenancy or apply to the Court to fix a fair rent. This provision is applicable only to cases where ejectments for non-payment of rent or on the title are brought by landlords against their tenants. But “where any proceedings for compelling the tenant of a present tenancy to quit his holding shall have been taken before or after an application to fix a judicial rent, and shall be pending before such application is disposed of, the Court before which such proceedings are pending shall have power, on such terms and conditions as the Court may direct, to postpone or suspend such proceedings until the termination of the proceedings on the application for such judicial rent, and the pendency of any such proceedings for compelling the tenant to quit his holding shall not interfere with the power of the Court to fix such rent, or with any right of the tenant resulting from the rent being so fixed.”

Mr. Sullivan contends that his client comes within those words. I am unable to adopt that argument. The sale under the *fi. fa.* was not “a proceeding for compelling a present tenant to quit his holding.” I therefore hold that the applicants are not entitled to the benefit of the Act.

THOMAS HANENN, TENANT; THE ASSIGNEES OF
SIR CHARLES DOMVILLE, BART, LANDLORDS.

Practice—Substitution of the service of originating notice—Bankruptcy of landlord—Receiver—How originating notice to be entitled.

IN this case, eight tenants on the property of Sir Charles Domville issued originating notices for the purpose of having a fair rent fixed. It appeared that Sir Charles Domville, who was out of the jurisdiction, had been adjudicated a bankrupt, and his estate had thereby vested in his assignees. A Receiver had been appointed by the Court of Bankruptcy over the bankrupt's estate, which he was managing.

L. Dillon applied on affidavit, on behalf of the tenants, to have the service of the originating notices substituted upon Mr. Bentham, the Receiver so appointed, as he was in receipt of the rents, and managed the property of the bankrupt.

O'HAGAN, J., held that the service of the originating notices upon Mr. Bentham would be sufficient, but directed that the originating notices, which had been entitled as "Thomas Hanenn and others, Tenants; Sir Charles Domville, Bart., Landlord," should be amended by describing the landlord as the "Assignees of Sir Charles Domville, Bart., Landlord," the legal estate having vested in the assignees on the bankruptcy of the landlord.

NOVEMBER 21, 1881.

(COMMON PLEAS DIVISION) (1).

RICHARD WARBURTON, PLAINTIFF; JOHN CONROY,
DEFENDANT.

Rent—Application to mark final judgment under Order XIII. of Judicature Act—L. L. (Ir.) Act, 1881, sect. 8, sub-sect. 2, and sect. 60.

THIS was an action to recover £189, being the amount of two half years' rent due by the Defendant on the 25th of

(1) Before MORRIS, C. J., and HARRISON, J.

March and 29th of September last, respectively, out of the lands of Turnakill, in the Queen's County.

Holmes, Q. C. (with *Atkinson, Q. C.*, and *M'Ivor*), applied, under Order XIII. of Judicature Act, for liberty to sign final judgment for the amount indorsed on the writ of summons in the action.

The Mac Dermot, Q. C., and *John Shortt*, for the Defendant, resisted the application, and relied upon the fact that, on the 4th of November, 1881, the Defendant caused the Plaintiff to be served with an originating notice to fix the fair rent of the lands included in the writ of summons, and had the application recorded on the 10th of November, 1881, being during the period of the first occasion of the sitting of the Court of the Land Commission; and counsel contended that, in accordance with what was laid down by Mr. Justice O'Hagan, first, that having an application to fix a fair rent recorded on the first occasion on which the Court sat threw back any order made on foot thereof to the 22nd of August, 1881; and, secondly, that the effect of the order was to govern every gale of rent that accrued subsequently, so that it was probable that the rent now sued for might be reduced.

MORRIS, C. J., said that the case was a perfectly plain one, and that the Plaintiff was entitled to get final judgment for the two gales of rent admittedly due by the Defendant.

HARRISON, J. :—

I entirely concur in the opinion of the CHIEF JUSTICE; but in consequence of the reported opinion of Mr. Justice O'Hagan I wish to make one or two observations. During the discussion here, the 2nd sub-sect. of the 8th section has not been referred to. Its words are: "The rent fixed by the Court"—that is, after the application—"shall be deemed to be the rent payable by the tenant as from the period commencing at the rent-day next succeeding the decision of the Court." The 1st sub-sect. enables the party to apply to the Land Court. No doubt, if the 60th section stood alone, it might bear the wide construction

contended for by The Mac Dermot; but whether that construction is not more than substantially qualified and overridden by the clause I have read is a matter requiring great consideration. As Mr. Justice O'Hagan's remarks, as published, would appear to have the effect of a judicial opinion—though I believe they were not made in any contested case, but merely formed part of the observations he made at the opening of his Court—he knowing that this case was coming on, wrote to me to say that he did not intend in those remarks to deal with the case that is now before the Court. He says in his letter: "The question is whether the judicial rent, when fixed, governs the rent payable on the gale day next succeeding the order, or only begins to run from that day. My reason for writing to you is, that it may possibly be said in some observations of mine at the opening of this Court that I treated the former as the true construction. Now, I never meant to deal with this question at all, or to express any opinion on it. I was simply expounding the 60th section, which has the effect, where application is made on the first occasion on which the Court sits, of making the order relate back to the day on which the Act came into force. This was all that I was considering. Whatever be the construction of sect. 8, sub-sect. 2, there is the same gain, that is, the same relative amount of gain, to the tenant who takes advantage of the 60th section. Reading over my words, they do, I think, seem to imply that the next ensuing gale would be paid according to the new rent; but I had not that question present to my mind at all. If it fell to me to decide, I might possibly, or probably, adopt the other view on the words of the sub-section."

NOVEMBER 23, 1881.

SHIEL *v.* BORROWS.

Application to transfer proceedings from the Civil Bill Court to the Land Commission—Right to such transfer—L. L. (Ir.) Act, 1881, sect. 37, sub-sect. 4—Rule 62.

Under the provisions of the L. L. (Ir.) Act, 1881, sect. 37, sub-sect. 4, and Rule 62, either landlord or tenant, where proceedings are commenced in

the Civil Bill Court, has a right to have the case transferred to the Land Commission. Such application is not in the nature of an application to change the venue in a personal action, but the applicant has a *prima facie* right to the transfer.

APPLICATION to transfer proceedings, commenced in the Civil Bill Court, to fix a fair rent, to the Land Commission, under sect. 37, sub-sect. 4 of the L. L. (Ir.) Act, 1881, which provides, "Where proceedings have been commenced in the Civil Bill Court, any party thereto may, within the prescribed period, apply to the Land Commission to transfer such proceedings from the Civil Bill Court to the Land Commission, and thereupon the Land Commission may order the same to be transferred accordingly." The prescribed period, by Rule 62, is fixed at one week at least before the first day of the sitting of the Civil Bill Court for civil business, at which the case would otherwise be heard.

The COURT made an order for transfer, holding that either party had a right to bring the case into the Land Commission Court if he so desired. The case of a party seeking to change the venue in a personal action is not analogous to such an application as the present, in which either party has a *prima facie* right to a transfer.

NOVEMBER 7, 28, 1881.

LAVERTY AND MAGEEAN v. MOORE (REVISED).

Extension of time to sell—Ejectment decree against the tenant obtained before passing of L. L. (Ir.) Act, 1881—Notice to quit—L. L. (Ir.) Act, 1881, sects. 13, sub-sects. 1 and 2.

Where a tenant has been served with a notice to quit, and an ejectment decree has been obtained against him prior to the passing of the L. L. (Ir.) Act, 1881, but not executed, the tenant has power, under L. L. (Ir.) Act, 1881, sect. 13, sub-sect. 1, to sell his tenancy at any time up to the execution of the ejectment decree; and an application to extend the time to sell, will be granted.

IN this case a notice, bearing date the 1st of November, 1881, was served on behalf of the tenants upon the landlord, of

an application for an order that the time during which the tenants might exercise their power of sale might be enlarged, and that, if necessary for the purpose of giving effect to said power of sale and of preserving the rights of said tenants under the Land Law (Ireland) Act, 1881, the landlord might be restrained from executing the decree in ejectment which he had obtained. The facts of the case are these :—Eliza Mageean was tenant from year to year of part of the lands of Ballylucas, containing 11 A. 1 R. 14 P. statute measure, which she held under Mr. Charles Moore, the present landlord, at the yearly rent of £15 5s. 0d., the gale-days being the 1st of May and 1st of November. She made her will on the 4th of April, 1879, appointing Bernard Laverty and Patrick Mageean her executors. She directed them to sell and convert her personal estate, and apply the proceeds upon certain trusts unnecessary to state. She died on the 25th of November, 1879, and probate of her will was granted to her executors on the 12th of December, 1879. It was stated in the affidavit of Patrick Mageean, sworn for the purpose of this motion, that the farm was offered for sale by public auction, pursuant to the directions in the will, but that the executors were unable to sell, by reason of the landlord prohibiting the sale, and threatening to evict any purchaser. Whether this be so or not, no sale took place, and, on the 27th of April, 1880, the executors were served with notice to quit on the 1st of November following.

On the 1st of June, 1881, a civil bill ejectment for overholding was served by the landlord, which came on to be heard at the June Sessions of Downpatrick, and, on the 17th of June, 1881, a decree for possession was given by the County Court Judge. Before the ejectment came on to be heard, the executors served a land claim, claiming compensation under sects. 1 and 3 of The Landlord and Tenant Act of 1870. The determination of this land claim being pending, the Judge put a stay upon the execution of the decree until the 1st of November, 1881. But in the meantime the Land Law Act of 1881 was enacted, and the executors deserted the land claim under the Act of 1870; and they also, on the 17th of October, 1881,

served on the landlord notice of their intention to sell the tenancy, and also an originating notice to have a judicial rent fixed, and, on the 1st of November, served notice of the present application.

Gartlan, for the tenant.

Thomas O'Shaughnessy, for the landlord.

Cur. adv. vult.

O'HAGAN, J., having referred to the facts of the case, delivered the judgment of the Court:—

Now, there is a portion of this notice as to which we have already in a similar case pronounced judgment. It is that which seeks an order restraining the landlord from executing the decree in ejectment. We are of opinion that we have no power to do so. By sect. 13, sub-sect. 3, of the Act the power to postpone or suspend proceedings to compel a tenant to quit his holding pending an application to fix a judicial rent is conferred, not on the Court which fixes the judicial rent, but on the Court before which the proceedings against the tenant are pending. In fact, in the present case an application was made on the 31st of October to the County Court Judge of the county of Down, to extend the stay already put by him on the ejectment decree until the judicial rent was determined, and that application was refused by the learned Judge. With the exercise of this discretion we have no power to interfere on this motion. I now return to the earlier part of the notice, that which seeks to extend the time during which the tenants may exercise their powers of sale. The question arises, have we jurisdiction to do so? This jurisdiction has been strongly combated on the part of the landlord by Mr. O'Shaughnessy, who asserts that the *status* of landlord and tenant was absolutely at an end; that it was put an end to by the notice to quit, followed by the ejectment decree, and that the stay put upon the execution of the decree pending the adjudication of the land claim had no effect what-

ever either to prolong the old tenancy, or to create a new one. That this was so, no lawyer will be hardy enough to controvert. Undoubtedly, as the law stood before the Act, the tenancy was at an end on the 1st of November, 1880, and the decree of 1881 was an adjudication to that effect which cannot now be controverted. It was decided in the case of *Tayleur v. Wildin* (1) that so strong is the effect of a notice to quit in determining a tenancy, that even its withdrawal or waiver did not restore the old tenancy, though if both parties assented it may have operated as an agreement to create a new one. An innovation was, however, to some extent made upon this principle of law by the Land Act of 1870, which by the 24th section provided that a tenant who might be decided by the Court to be entitled to compensation to be paid by any landlord should not be compelled by process of law to quit his holding until the compensation was paid or deposited; and by the definition of "tenant" in sect. 70, which declares that "where the tenancy of any person having been a tenant under a tenancy which does not disentitle him to compensation under the Act, is determined, or expiring, he shall, notwithstanding such determination, or expiration, be deemed to be a tenant until the compensation, if any, due to him under this Act has been paid or deposited." Here undoubtedly the name of tenant is conferred, under certain circumstances, upon a person who had been tenant, notwithstanding the determination of his tenancy. By the 57th section of the Act of 1881, that Act and the Act of 1870 are to be construed together as one Act, except where they are inconsistent with one another. That cannot be directly relied on in the present case, as no question as to compensation now arises, and the definition of tenant in the Act of 1881 differs materially from that in the Act of 1870. It is on the 13th section of the Act of 1881 itself, and sub-sects. 1 and 2 of that section, that Mr. Gartlan, for the tenants, strongly relies. Certainly, it is a section by no means easy to elucidate. It is not our province to criticise the work of the legislature,

(1) L. R. 3 Exch. 303.

but one cannot help wishing it had been a little more explicit as to its meaning. Sub-sect. 1 is as follows:—[Read sub-sect. 1.] Now putting aside ejectments for non-payment of rent in which the legal period of redemption is the limit, the right to sell his tenancy is expressly given to the tenant up to the execution of the writ or decree in ejectment, and the tenancy so sold is to be deemed a subsisting tenancy notwithstanding such proceedings; and moreover, when the judgment or decree has been obtained before the passing of the Act, such tenant may, within the same periods, respectively, apply to the Court to fix the judicial rent of the holding. If these words do not apply to the present case, to what case can they by possibility apply? I put this to Mr. O'Shaughnessy in the course of the argument. There is difficulty, and, in my judgment, insurmountable difficulty, in applying this sub-section to the case of an ejectment brought before the passing of the Act, on an expired lease; but unless we are to erase the words of the sub-section altogether, how can we refuse to give operation to them in dealing with a tenancy from year to year? Mr. O'Shaughnessy argued that the sub-section is conversant with proceedings by a landlord to compel a tenant to quit his tenancy, and that, in this case, they were no longer tenants. But, in my opinion, the proceedings to compel the tenant to quit his tenancy embrace the whole course of proceedings commencing with the notice to quit when the tenant was clearly so. I would also advert to the 20th section of the Act, by which tenancies to which the Act applies are deemed to be determined not as formerly, by some act or event which, independently of possession, puts an end to the relation of landlord and tenant, but by the resumption by the landlord of his holding. On the whole, I am of opinion, and am happy in this to have the concurrence of my colleagues, that the tenancy is one which might have been sold by the tenants at any time up to the actual execution of the decree—that when so sold it should be deemed to be a subsisting tenancy, *i. e.*, that notwithstanding the notice to quit and the ejectment, the former tenancy from year to year should be deemed to be still subsisting, and that the tenants were entitled to serve as they did serve, while the

ejectment decree was unexecuted, notice of an application to fix a fair rent. I come now to the 2nd sub-section, which runs thus:—"Where the sale of any tenancy is delayed by reason of any application being made to the Court, or for any other reasonable cause, the Court may, on the application of the tenant, or on such terms and conditions as the Court may direct, enlarge the time during which the tenant may exercise his power of sale, or in case of ejectment for non-payment of rent redeem the tenancy." In par. 11 of Mr. Mageean's affidavit he says he is informed and believes that the farm will sell to better advantage if the judicial rent of same be first fixed by the Court, and that a sale could not be had nor a rent fixed before the expiration of the stay put on the decree by the County Court Judge. Under these circumstances, the tenants apply to this Court to extend the period within which the tenants may exercise their power of sale; and we do so until the 15th [of January, 1882.

The parties must respectively bear their own costs of this motion.

NOVEMBER 14, DECEMBER 2, 1881.

MARY RUTLEDGE v. ROBERT AND W. RUTLEDGE;

AND

FLETCHER v. M'CORMICK (REVISED).

Expiration of lease prior to passing of L. L. (Ir.) Act, 1881—Ejectment for overholding—Application to enlarge time for sale—Ordinary tenancy from year to year—L. L. (Ir.) Act, 1881, sect. 13, sub-sects. 1 and 2, and sect. 21—23 & 24 Vict. c. 154, sect. 34.

Where a lease expired prior to the passing of the L. L. (Ir.) Act, 1881, by the dropping of a life, and the landlord obtained a decree in ejectment for overholding, but did not execute the decree until the tenant had served an originating notice to fix a fair rent, and sell under sect. 13 of the L. L. (Ir.) Act, 1881, it was *Held—per* O'HAGAN, J., and MR. COMMISSIONER VERNON—that no such right existed in the tenant, and that the tenancy was determined. MR. COMMISSIONER LITTON, Q. C., *dissentiente*.

IN the case of *Rutledge v. Rutledge*, it appeared that William Rutledge, the husband of Mary Rutledge, held a farm in the county of Tyrone, containing 19 A. 3 R. 0 P., at the yearly rent of £4, by virtue of a lease for his own life and a concurrent term of years. The term of years had long since expired; and William Rutledge the tenant died on the 26th of January, 1881, having by his will devised*to his wife the farm. The lease having terminated by the death, the landlords proceeded by civil bill ejectment against the widow for overholding, and obtained a decree for possession at the June Sessions, with stay of execution until the 1st of November, 1881. On the 17th of October, Robert Rutledge was served with an originating notice by Mary Rutledge to fix a fair rent. No valid service was effected on William Rutledge until the 25th of October, when both landlords were served with notice that application would be made to stay the execution of the ejectment decree, and to enlarge the time during which Mrs. Rutledge might sell her tenancy, until the Court had fixed her judicial rent. On the 25th of October, a week before the expiration of the period fixed by the County Court Judge, the landlords entered into possession. The tenant then withdrew the notice to stay execution of the ejectment, and, on the 3rd of November, served notice of application to enlarge the time within which the tenant might exercise her power of sale, until a judicial rent had been fixed.

In the case of *Fletcher v. M'Cormick* substantially a similar point arose. The cases were argued together.

Monroe, Q. C. (with him *Campbell*), for the tenants:—

Under sect. 34 of Deasy's Act, 1860, the tenant has a right to continue to hold on his tenancy in lieu of emblements till the last gale-day of the current year.

The lease did not, therefore, terminate till after the Act; and by this provision of Deasy's Act, taken jointly with sect. 21 of L. L. (Ir.) Act, 1881, the tenant is a present tenant.

But this case falls within the words of sect. 13, sub-sect. 1, which gives a right to sell, and fix a fair rent, "at any time

before, but not after, the execution of such writ or decree in any ejectment other than for non-payment of rent.

Donnell, Drummond, and Gordon, for the landlords :—

The emblemment section of Deasy's Act does not apply : *Kelly v. Webber* (1); *Hyde v. Roche* (2); *Stradbroke v. Mulcahy* (3). The tenancy is at an end by the decree, and the tenant cannot be treated as a tenant from year to year.

Cur. adv. vult.

The judgment of the Court was delivered by

O'HAGAN, J. :—

This case differs from the case of *Laverty*, tenant, *Moore*, landlord, in one particular (*see* p. 36), and, in my opinion, one essential particular. The ejectment was brought, not on the determination of a tenancy from year to year and notice to quit, but on the determination of a tenancy by the expiration of a lease. William Rutledge, the husband of Mary, held a farm in the county Tyrone, containing 19 A. 3 R. 0 P., at the yearly rent of £4, by virtue of a lease for his own life and a concurrent term of years. The landlords were Robert and William Rutledge. The term of years has long since expired, and William Rutledge the tenant died on the 26th of January, 1881, having by his will devised the farm to his wife Mary Rutledge. By his will he purported to bequeath the farm to his wife Mary Rutledge. The lease having terminated on the death of William Rutledge the tenant, the landlords issued a civil bill ejectment for overholding against Mary Rutledge. The ejectment came on for trial at the County Court of Strabane on the 7th of April, 1881, and was then adjourned till the June Sessions.

A decree for possession was granted at those Sessions, with a stay of execution till the 1st of November, 1881. On the 17th of October, 1881, Robert Rutledge, one of the landlords, was served with an originating notice by Mary Rutledge to fix

(1) 11 Ir. C. L. R. 57.

(3) 2 Ir. C. L. R. 406.

(2) 5 Ir. C. L. R. 200.

a fair rent. No valid service was effected on William Rutledge until the 25th of October. A motion, dated the 24th of October, was, on the 25th of October, served on both landlords; that notice being of an application to this Court to stay the execution of the ejectment decree, and to enlarge the time during which she might sell her tenancy, until the Court had fixed the judicial rent.

Consequent on this notice, and possibly alarmed by it, the landlords took a step which, in my judgment, cannot be defended. They, on the 25th of October, a week before the expiration of the stay put by the County Court Judge on the execution of the decree executed it. This was plainly an illegal act. Whether the stay was or was not by consent is immaterial. By the 96th of the County Court Rules of 1877, framed under the authority of a statute, the Judge has power in all cases of decrees in ejectments to grant such stay of execution as he may, under the circumstances, "consider reasonable." It is not for us to consider in what position this Act has placed the landlords in the eye of a Court of Law. It is enough to say that, holding it to be unlawful, we tried it in dealing with the rights of the applicant as if it had never taken place. I now come to the present notice:—When the notice of the 24th of October was first moved before us, there was a portion of it as to which we expressed an unhesitating opinion, namely, that portion which sought to stay the execution of the ejectment decree. We have no jurisdiction to do so, as we have in several cases decided. It would of course have been in our power to refuse that portion of the notice, and make an order on the further portion; but it was thought better, on the part of the tenant, to ask for liberty to withdraw the motion of the 24th of October, and to serve a new notice, simply asking that the time during which the tenant might exercise her power of sale should be enlarged until the application of the tenant to fix a fair rent of the holding was finally disposed of. Accordingly, a notice in those terms was served on the 3rd of November, and this is the notice with which we have to deal. It raises a question of great difficulty and importance. In forming a judgment upon that question,

we have had not only the able assistance of the counsel Mr. Drummond and Mr. Donnell, who argued the present case, but also the benefit of the arguments addressed to us by Mr. Monroe and Mr. Campbell for the tenant, and Mr. Drummond and Mr. Gordon for the landlord, in the case of *M^r Cormick*, landlord, *Fletcher and others*, tenants, in which the same question substantially arises. Now what has been urged upon us in support of the present application is—first, that under the provisions of the 21st section of the Land Law Act of 1881, Mary Rutledge is the tenant of a present ordinary tenancy from year to year, at the yearly rent of £4, subject to the conditions of the expired lease; and secondly, even if that contention cannot be sustained, yet that, under the 13th section of the Act, she had a right to sell her tenancy at any time up to the actual execution of the decree, and to apply to the Court to extend the time for so doing. The first contention is sought to be maintained by the conjoint effect of the 34th section of the Landlord and Tenant Act of 1860—what is termed the emblement section—and portion of the 21st section of the Land Law Act of 1881. The 34th section of the Act of 1860 enacts that where a lease of lands held at rack-rent expires by the death of a life, or other uncertain contingencies, the occupying tenant, in lieu of the right to emblements, where such right shall exist, shall, if he think proper, continue to hold and occupy until the last gale-day of the current year; and the section goes on to enact, amongst other things, that the landlord and tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to all the terms, conditions and restrictions to which they would have respectively been entitled and subject in case the lease or tenancy had determined at the expiration of the current year. In the present case it was admitted that the rent was payable annually on the 1st of November; so that the 1st of November was both the first and the last gale-day of the current year: and what was argued by Mr. Drummond was, that the effect of the 34th section of the Act of 1860 was to make the tenancy continue until the 1st of November, 1881, as if

William Rutledge the tenant had not died until that day ; that therefore, the lease, in the eye of the law, did not expire until after the passing of the Act of 1881 ; and accordingly, that Mary Rutledge, being in *bonâ fide* possession of her holding, should be deemed to be a tenant of a present ordinary tenancy from year to year. Now I am far from saying that a very serious question might not arise if the 34th section of the Act of 1860 applied to the case, and I am not to be understood as giving any opinion upon that question. But I think that the emblement section does not apply in the present instance. In the first place the land cannot, in my opinion, be considered as held at a rack-rent. The rent is £4 a-year ; the Government valuation is £8 15s. 0d. ; and William Rutledge, in the sixth paragraph of his affidavit, swears that the lands if let at present would bring considerably more than the valuation, and that he would not now take £16 a-year for them. Secondly, it is not shown that any right to emblements in fact existed, which is a necessary condition under the 34th section. But what is to my mind conclusive in the case is the ejectment decree. If the tenant, under the 34th section of the Act of 1860, had a right to remain in the holding until the 1st of November, 1881, that would, I conceive, have formed a clear defence to the ejectment brought in June, 1881. The stay put upon it by the County Court Judge was a matter not of right, but of discretion. The decree was a distinct adjudication that the tenancy was at an end, and therefore that it was not continued under the 34th section of the Act of 1860.

But the ulterior, and far more important, question remains—the question which was that substantially raised and contested in this case, namely, whether, even supposing that the tenancy had determined on the expiration of the notice to quit, yet, inasmuch as the decree was not as yet executed, the tenant had the right under sect. 13, sub-sect. 1 of the Act of 1881, not only to sell his tenancy but to have a fair rent fixed, with the consequence of attracting a statutory term. And whether we, the Court, had the power, under sub-sect. 2 of that section, to extend the time during which the tenancy might be sold. The question

thus raised is one, it must be owned, of great difficulty. We have already unanimously declared, in the case of *Moore*, landlord, *Laverty* and *Mageean*, tenants (p. 36), that where, before the passing of the Act, an ejectment decree founded on a notice to quit had been obtained against a tenant from year to year, but remained unexecuted, the tenant was, notwithstanding the decree, still entitled to sell under the 13th section, and that the tenancy so sold was to be deemed a subsisting tenancy, and that the tenant was entitled to have a fair rent fixed. We thought we could come to no other conclusion under the express terms of the section. But the present question is a very different one. It arises not on a tenancy from year to year determined by a notice to quit, but on the expiration of a lease. Now, on this question I have to state that the unanimity which has hitherto characterised the judgments of this Court does not exist; nor is this to be wondered at. On the contrary, it would be surprising if, in construing one of the most perplexing clauses ever presented for judicial interpretation, different views did not commend themselves to different minds. My brother LITTON is of opinion that in this case, as in that of the tenancy from year to year, the tenant against whom the ejectment decree has been obtained has the right to sell, the right to have the tenancy, when sold, deemed a subsisting tenancy, and the right to have a fair rent fixed. I have read the section times without number, and I find myself unable to adopt this view. I proceed to say why; and, to prevent misconception, I say at once that I do not base my opinion upon any technical ground of the relation of landlord and tenant having ceased on the expiration of the lease. I fully acknowledge that, under this Act, a former tenant still in occupation may be deemed a tenant, though the old law would have designated him a trespasser. Neither do I assert that the claim of the tenant in this case contravenes the policy of the Act. I should be disposed to say the opposite. When the legislature has gone so far as to create for any tenant of a lease which should expire after the passing of the Act, and within sixty years of its passing, a tenancy from year to year, which should be deemed to be a present tenancy, *i. e.* a tenancy existing at

the date of the passing of the Act, there would be nothing strange or inconsistent in giving similar rights to the tenant of a tenancy under a lease which had expired before the passing of the Act, but of which the tenant had still remained in occupation. All I say is, that I cannot find that the legislature has done so. The words of the 13th sect. are:—"Where proceedings are or have been taken by the landlord to compel a tenant to quit his holding, the tenant may sell his tenancy at any time before, but not after, the expiration of six months from the execution of a writ or decree for possession in an ejectment for non-payment of rent, and at any time before, but not after, the execution of such writ or decree in any ejectment other than for non-payment of rent; and any such tenancy so sold shall be, and be deemed to be, a subsisting tenancy, notwithstanding such proceedings, without prejudice to the landlord's rights in the event of the said tenancy not being redeemed within said period of six months; and if any judgment or decree in ejectment has been obtained before the passing of this Act, such tenant may, within the same periods respectively, apply to the Court to fix the judicial rent of the holding; but subject to the provisions herein contained, such application shall not invalidate or prejudice any such judgment or decree, which shall remain in full force and effect."

Now, in the case of an expired lease, what tenancy is there to sell? I can perfectly understand that under the Ulster tenant-right custom, or any analogous custom, there might be a tenant-right or good-will to sell, with the assent of the landlord to any incoming tenant, whether he comes in as lessee under a lease, or as tenant from year to year. But that is not what is meant by the section. What is sold is the tenancy. Section 57 defines a tenant to be "a person occupying land under a contract of tenancy, and includes the successors in title to a tenant"; and a tenancy to be "the interest in a holding of a tenant and his successors in title during the continuance of a tenancy." It goes on to say that, notwithstanding the proceedings to compel the tenant to quit his holding the tenancy shall be deemed to be a subsisting tenancy. In the case of a tenancy from year to year deter-

mined by a notice to quit, we have already held that these words impute the continuance or revival of the pre-existing tenancy from year to year. But in the case of an expired lease, what is to be deemed the subsisting tenancy? What is there to be continued or revived? The tenancy was not that continuous springing tenancy arising *de anno in annum* which is the definition of a tenancy from year to year, but a tenancy for a definite period, either for years, or, as in the present case, for life. How can that be deemed to be subsisting? I put this question to the very able and eminent counsel who argued for the tenants, and they gave me the only answer which, from their point of view, it was possible to give, that the statute created a tenancy which had never before existed, that is to say, a tenancy from year to year on the terms of the expired lease. But can such an interpretation be given to the words "shall be deemed to be a subsisting tenancy"? The word *subsist*, no doubt, is sometimes used as merely synonymous with *exist* or *be*, but its more proper, and in legal phraseology certainly its more usual import is, that which implies the continuance or revival of something pre-existing, not the creation of something *de novo*. Where the legislature did intend to create such a tenancy *de novo*, as in the case of leases expiring after the Act, it used, in sect. 21, the most clear, express, and unambiguous language. There is another observation to be made which has strongly impressed me. It is not contended, as I understood the learned counsel, nor indeed do I think it could be, that when the lease expired before the passing of the Act, there is created absolutely, and without reference to a sale, a new tenancy from year to year. It is only said that such tenancy arises when a sale takes place. Now, farther on in the section it is provided that where the judgment or decree has been before the passing of the Act, the tenant may, within the same periods respectively, apply to have a judicial rent fixed for the holding. That right is apparently by the section given quite independently of the sale of the tenancy. But by the 8th section of the Act, the right to have a fair rent fixed by the Court conferred only on tenants of tenancies from year to

year. Is not that a weighty argument to show that tenancies from year to year, and such tenancies alone, were in the contemplation of the legislature when the 13th section was enacted?

I may say, moreover, that if the 13th section applies to leases, it must be held to apply not only to leases which expired before the passing of the Act, but to those which should expire subsequently. As to all such leases, it must be held, according to the advocates of the tenants, that under the 13th section a tenancy from year to year springs up on the determination of the lease, either upon sale or implied sale. But if so, why the express provisions of the 21st section as to tenancy under leases expiring after the passing of the Act? As to these, no question can arise, and it is difficult to comprehend why they were so carefully provided for by the 21st section if they were already protected by the 13th.

Again, if the 13th section applies to tenancies under leases, it must follow that, with respect to any lease existing at the present hour, if an ejectment be brought for non-payment of rent, we must have power to extend the time for sale of the tenancy and for redemption. I feel great difficulty in reconciling such a power with the express terms of the 21st section, which enacts that existing leases shall be governed by the provisions of such leases. I am, on the whole, of opinion that tenancies under existing leases were out of the purview of the legislature in enacting sect. 13 of the Act.

If it be said that the words at the commencement of the section are wide enough to embrace such tenancies, I can only answer that, from the earliest period down to the present time, it has been a recognised and established canon in the construction of statutes, that cases which come within the words of an Act of Parliament, as literally construed, are, nevertheless, to be excluded if, according to the intent and meaning of the legislature, they do not seem intended to be comprised. There is a well-known passage in Plowden's Reports (*Stradling v. Morgan*) (1), which is cited by Lord Justice Turner in the case of *Hawkins v. Gathercole* (2), and is declared by the Lord Justice to contain

(1) Plowd. 204.

(2) 6 De Gex, M'N. & G. 21.

the best summary with which he was acquainted of the law on the subject. The passage from Plowden is as follows:—
“The Judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular where the intent was particular . . . ; and these statutes, which comprehend all things in the letter they have expounded to extend but to some things, and those which include every person in the letter they have adjudged to reach to some persons only.”

In the present case, however, it is not upon any general intention of the statute that I base my opinion. It is because the 13th section itself, taken in its entirety, notwithstanding the generality of the words in the beginning, does not seem to me, for the reasons I have detailed, to embrace within its purview the case of a tenant holding over after the determination of a lease which expired before the passing of the Act.

MR. COMMISSIONER VERNON concurred with MR. JUSTICE O'HAGAN.

MR. COMMISSIONER LITTON, Q. C. :—

In these cases of *Rutledge v. Rutledge* and *Fletcher v. M' Cormick*, which involve the same question, I am unable to concur in the judgment which has been pronounced.

The 13th section in express terms refers to two classes of ejectment in which decrees or judgments for possession may have been obtained, namely, ejectments for non-payment of rent; and, to use the words of the section, “any ejectment other than for non-payment of rent;” words which appear to me as equivalent to “every” ejectment other than for non-payment of rent. Upon the tenant against whom the decree for possession has been obtained, the statute purports to confer a certain right, which, at his election, he may exercise within the periods respectively prescribed; that is to say, in ejectments for non-payment of rent, within the time limited for redemption: in ejectments other than for non-payment of rent, before, but not after, the execution of the decree, and that right is expressed in the words “the tenant may sell his tenancy.”

Now that this enactment confers on the tenant a right wholly unknown before, and that it attains its object by creating a new relationship of landlord and tenant where the former relationship had ceased to exist, is no argument against giving effect to the provision in favour of the tenant, if the ordinary signification of the language justifies our doing so. Nor is it a part of our duty to consider whether the remarkable results which must follow were or were not within the intention of the legislature, except so far as that intention may or may not be gathered from the words themselves. To construe the language by a supposed intention would be to make law, instead of interpreting the law as made. And I take it to be our duty, wholly irrespective of consequences as regards the relative position of those who come within its terms, to give effect to the enactment, however strange a result may thereby be effected.

Regarding then the section itself, it is manifest that it refers only to cases where the relation of landlord and tenant at one time existed; and where proceedings are, or have been, taken to compel the tenant to quit his holding. Now, in no case can a tenant be compelled to quit his holding until his tenancy has been determined, and, consequently, the terms landlord and tenant, as used in this section, must of necessity have reference to the past relationship which existed between them—the relationship which has been determined in law, and by reason of which determination alone the proceedings to compel the tenant, that is, the person who lately had been tenant, to quit the holding, could be maintained; the definitions of “landlord” and “tenant,” so far as they may be inapplicable, must yield to the context; and provision is made in the opening words of the 57th section to meet cases where the meaning of those terms, as defined, would render the context insensible. The definition of holding, however, exactly applies; for it includes “the parcel of land upon the determination of the tenancy discharged of the tenancy.”

All this is plain enough. The question, however, is what does the section enact under these circumstances? It plainly

declares that the tenant may sell his tenancy up to the time the landlord transfers to himself the possession of the holding by executing his decree. It is manifest the tenant has no tenancy to sell, for the tenancy has been determined, and the decree or judgment rests on the fact that such is the case; and if the enactment ended there, it would have been wholly inoperative; it would have been a permission to sell a non-existing interest: but the section adds—"any such tenancy, so sold, shall be deemed to be a subsisting tenancy notwithstanding such proceedings," namely, the proceedings which had terminated in the decree for possession.

The sub-section appears to me to create in express terms, for the purpose of sale, a tenancy designated a subsisting tenancy, the moment the occupier proceeds to exercise his right of sale by giving notice to the landlord of his intention to sell within the prescribed period, to create a tenancy for the purpose of transfer to a purchaser, and for no other purpose, in every case where the occupation has not been determined by execution of the decree prior to the exercise of the right conferred.

It is said this is a strange result—to actually create an interest against the landlord which will place the purchaser from the late tenant in a position to claim the benefit of the Act, and so defeat the landlord's right to possession under his decree. The result is strange, but I am not concerned with that, and the Court has unanimously concluded, in the case of *Rafferty v. Moore*, that this is so where a tenancy from year to year has been determined by notice to quit. It was impossible to arrive at any other conclusion, unless the sub-section was to be treated as a nullity. I have now to inquire whether the section applies with a like result to cases where the holding was under lease, and where the tenancy expired by effluxion of time, or other event, instead of being determined by notice to quit. I confess it appears to me the words of the section are just as applicable to the latter cases as to cases where the tenancy has been one from year to year, and that every reason and every difficulty which can be suggested in the one case exists in the other. Having come to the conclusion that the

Act creates a "subsisting tenancy," for the purpose of sale, in the case of a tenant who *had* been tenant from year to year, I see no greater difficulty in the case of a tenant who *had* been tenant under a lease. Observe—the "proceedings" mentioned in the section are proceedings to compel the tenant to quit the holding—not proceedings to terminate the tenancy. The holding is the "parcel of land discharged from the tenancy." It is enough to entitle the tenant—that is, the late tenant who still occupies—to exercise his right of sale, that proceedings are taken to compel him to quit the holding. Those are the words of the section. It is not stated that the right of sale is conferred only in cases where the landlord takes proceedings to terminate the tenancy, and follows those proceedings up by compelling the tenant to quit the holding. If such was expressed, the section, I admit, could only apply to tenancies determined by the action of the landlord. The language includes cases where the tenancy has been determined by the action of the landlord, but it points to cases where the tenancy has determined without any action of the landlord, and where the proceedings are taken to compel the tenant to quit the holding or "parcel of land discharged from the tenancy."

Again, how is it possible to strike out of the section the words "Any ejectment other than for non-payment of rent"? If any force is to be allowed to these words, they must extend to a decree in an ejectment against a tenant overholding on the expiration of a lease, as well as to an ejectment grounded on notice to quit.

What difference is there in point of law in the *status* of the tenant whose tenancy was determined by notice to quit, and the tenant whose tenancy has determined by the expiration of his lease?—None in substance. If there be a difference, it is in favour of the tenant whose lease expires—for, if entitled to emblements, he may continue in occupation to the end of the year; and even if not so entitled, he may be a tenant by sufferance. If not in a better position, he cannot be in a worse position.

It is to be observed, I think, that it is not the old tenancy

which is again set up—that would be impossible—but for the purpose of sale a tenancy is created which is called a “subsisting tenancy.” The words are—a tenancy; not *the* tenancy which before existed. And I do not see any greater difficulty in reason or in law in creating a subsisting tenancy in the case where the holding is discharged from the tenancy by lapse of time, or other uncertain event, than when the holding is discharged from the tenancy by notice to quit.

The words of the section appear to me, in express words, to reach beyond tenancies from year to year. The late C. B. Pigot, a most eminent Judge, in *Falls v. The Belfast and Ballymena Railway* (1), speaking of interpreting the words of a statute, says—“If the words are clear we are bound, whatever be the result, to interpret and apply them according to their obvious import.” And the same learned Judge, in *Betty v. Nail* (2), says—“We are not to deal with inconveniences, but with the words of the legislature; where reasons of hardship are proposed we should consider them on the other side also. Our course ought to be to adhere to the plain terms of the Act, and not to speculate on the policy of the Act.” And in *Nolan’s Case* (3), Crampton, J.—“No imaginary policy of the framers of the statute can control words large enough to give a right.”

I think the words of the 1st sub-section, referring to proceedings to compel the late tenant to quit the holding, not being limited to proceedings to terminate the tenancy, and the express use of the words “Any ejectment other than for non-payment of rent,” are large enough to give a right to the one class of tenants just as much as to the other.

We should, I think, bear in mind that the whole object of the statute was to create for the tenant an interest in respect of his occupation—an interest which was never recognised before. Tenants of agricultural holdings have, in respect of their occupation, acquired under the Act a right of sale if they wish to sell, and a right to durability of tenure so long as they wish to

(1) 12 Ir. L. R. 285.

(3) 4 Ir. C. L. R. 293.

(2) 6 Ir. C. L. R. 26.

remain in occupation, paying a fair rent, and observing the ordinary obligations of a tenant to his landlord. This is the essential characteristic of the Act. In respect of leaseholds which terminate after the 22nd of August, 1881, the *status* of the tenant is that of a present tenant. In respect of interests which terminated before the 22nd of August, where the landlord has failed to clothe himself with the possession by executing his decree, and has allowed the occupation to remain undisturbed, it appears to me the 13th section confers on the occupier a right which he may exercise, and thereby create an interest for the purpose of transfer to a purchaser, in the parcel of land he occupies, discharged from the pre-existing tenancy, before, but not after, the execution of the decree.

Agricultural leases have never been accepted in this country with the understanding that the possession was to be resumed by the landlord when the twenty-one or thirty-one years for which they were granted expired. They were regarded as fixing the rent for a definite period, and as giving the tenant rest from the irritating process of annual notices to quit, and constant changes of rent. They have been properly described as but deferred notices to quit, on the expiration of which a revision of rent might take place while the possession remained undisturbed. This is the foundation of the 21st section; and although the legal right of the landlord to take possession when leases or tenancies have expired before the Act has not been interfered with, the 13th section interposes in favour of the occupying tenant against whom judgment has been obtained, where the landlord has not followed up his proceeding by actually executing the decree. I feel compelled then to differ from the judgment of the Court, and am bound to express my opinion that the 13th section is not confined to ejectments founded on notice to quit, but applies to every ejectment where the relation of landlord and tenant existed between the parties prior to the determination of the tenancy.

DECEMBER 5, 1881.

LEVINGE *v.* DARCY (REVISED) (1).

*Application to have lease declared void—Sect. 21 of L. L. (Ir.) Act, 1881—
Jurisdiction to be exercised by the Court of the Land Commission in
setting aside leases.*

THE application in this case was on behalf of the tenant to have his lease of certain lands in the Co. of Westmeath declared void. The lease in question contained covenants against alienation, against taking advantage of the provisions of the Land Act of 1870, and also a covenant by the tenant that he should pay the whole of the county cess. The lease also contained a recital that the farm contained 9A. 1R. 22P., the rent being £8 a-year, whereas this appeared in evidence to be a mis-statement of the actual acreage of the farm. The tenant swore that he went into possession of the farm on the understanding that the measurement was 6 acres, and that he was to hold it at the rate of £1 per acre; that those terms were agreed to by the landlord; but that after some time (the tenant having previously incurred considerable expense in carting building materials for the purpose of erecting two houses on the farm) he was informed by the landlord that he would permit no further work to be gone into unless the tenant took out a lease, which he alleged he was coerced into accepting. The landlord swore that there was a distinct agreement, when Levinge entered into possession, that he should take out a lease, and that the tenant merely went into possession pending the preparation of the lease.

D. Sherlock appeared for the tenant.

S. Walker, Q. C., and Philip White, for the landlord.

(1) Before MR. JUSTICE O'HAGAN, and MESSRS. COMMISSIONERS LUTON, Q. C., and VERNON.

MR. JUSTICE O'HAGAN said the jurisdiction exercised by the Court in this matter was very beneficial, but it was circumscribed in the clearest manner. The jurisdiction arose under the 21st section of the Land Law Act, which enacted:—"In any case in which the Court shall be satisfied that since the passing of the Landlord and Tenant (Ireland) Act, 1870, the acceptance by a tenant from year to year of a lease of his holding containing terms which, in the opinion of the Court, were at the time of such acceptance unreasonable and unfair to the tenant, having regard to the provisions of the said Act, was procured by the landlord by threat of eviction or undue influence, the Court may, upon the application of the tenant, made within six months after the passing of this Act, declare such lease to be void. . . ." There never was the least idea of giving to that Commission a general jurisdiction such as was exercised by the Courts of Equity; and if the tenant here thought he had any case, he must go before those tribunals to enforce it. The jurisdiction given to the Commission was, when it was found that a man was in possession from year to year, and where the landlord said: "If you do not take a lease, I will turn you out;" and if the lease contain terms unfair to the tenant, having regard to the Act of 1870, in such a case as that the Court would deal most seriously with the landlord. But where, as in this case, the landlord entered into an agreement for a lease, and allowed the tenant into possession, as was a common case, pending the actual execution of the lease—which naturally took some time to prepare—if the tenant were at liberty to come in and say he had got into possession as tenant from year to year, the Court would be flooded with cases of this kind. There would be as great an opening to fraud as could be conceived. If, in the present case, Mr. D'Arcy were no longer a living man, the Court could not have asked any evidence on the part of the landlord, having regard to the circumstances of the case. Any jury would find that the tenant was in possession on the terms of getting a lease. The evidence was most conclusive in favour of the landlord, and the Court should, therefore, refuse the application.

MR. COMMISSIONER LITTON concurred. He agreed that the 21st section was most beneficial, but it was never intended to apply to such a case as that before the Court. The lease here appeared to be hard in its terms; but those terms were willingly assented to by the tenant, on the ground that he got immediate possession. It did not lie upon him now to take advantage of what occurred.

MR. JUSTICE O'HAGAN said he was desired by MR. COMMISSIONER VERNON to say that he, taking a juror's view of the matter, entirely concurred in the judgment of the Court.

Solicitor for the Tenant: *N. J. Downes.*

Solicitor for the Landlord: *Matthew White.*

DECEMBER 8, 1881.

BLIGH *v.* KIRWAN (REVISED) (1).

Application to declare lease void—Sect. 21 L. L. (Ir.) Act, 1881—Lease executed under coercion or threat of eviction—Covenants unreasonable or unfair to the tenant, having regard to the provisions of the Landlord and Tenant (Ireland) Act, 1870—Jurisdiction to be exercised by the Court in setting aside leases.

THIS was an application on behalf of Bligh, the tenant, to have a lease made to him in April, 1872, of certain lands in the Co. Galway declared void, it having been executed by Bligh, as he alleged, under coercion and threat of eviction, and also as containing covenants which were unreasonable and unfair to him. The applicant and his family had been very old tenants on the Kirwan property in the county of Galway; and the rent which they paid up to 1872 was £40 a-year, which was raised to £70 a-year in 1872. It appeared in evidence

(1) Before MR. JUSTICE O'HAGAN, and MESSRS. COMMISSIONERS LITTON, Q. C., and VERNON.

that the tenant's father had built a house on the farm, had walled and fenced it in, and had executed drainage and other works of reclamation, which very much improved the lands; that up to and including the year 1871 the lands were held from year to year, and that the landlord, on the 31st of March, 1872, gave a receipt to the tenant for £20, being the half year's rent due up to the 1st of November, 1871; that after the giving of this receipt the landlord sent for the tenant, and informed him that there should be a new arrangement, as his holding was set too low, and that the tenant should take a lease at an increased rent of £30 a-year; to this proposition the tenant declined to accede, and said he would rather be a yearly tenant; but this was of no avail, as he alleged, and a lease was forced upon him, and he had to agree to take a lease of his holding at £70 a-year, the fair rent of the holding at the time of the taking of the lease being, in the opinion of the tenant, £40 a-year.

The lease which the tenant accepted contained, amongst others, covenants against keeping dogs on the farm, a covenant that the tenant should preserve the game from being poached upon, and also a proviso that, in case of any breach of the covenants, that the breach would operate either as working a forfeiture or as entitling the landlord to demand an increase of £1 an acre on the farm, at his option.

It appeared in evidence for the landlord that the holding in question was held under a lease for lives, or a concurrent term of thirty-one years from 1823; that on the surrender of this lease in October, 1848, the father of the present applicant made an offer, which was accepted, for a lease of the farm for twenty-one years at £40 a-year. On the expiration of this lease, as it was alleged by the landlord, negotiations were entered into between the landlord and tenant, and the present lease was granted.

Francis Nolan appeared for the tenant.

Hugh Holmes, Q. C., for the landlord.

MR. JUSTICE O'HAGAN said that, as he had already observed in two previous cases, the jurisdiction of the Court was bounded completely by the terms of the Act of Parliament, and they could in no way go outside them. In order to break a lease, they must find that the applicant was a tenant from year to year at the time of the acceptance of the lease, that the lease contained conditions that were unreasonable or unfair, having regard to the Act of 1870, and that the lease was obtained by threats of eviction. Unless all these matters concurred, they were debarred by the statute from granting the application. In order to arrive at a right conclusion in the case, they had examined the books of the agent. He must say that the agent's books were kept in a manner worthy of imitation by every gentleman similarly engaged in Ireland. They contained a record of everything that occurred between landlord and tenant, and in every respect were very much to be commended. They had been of great assistance to the Court. He was not going to offer an opinion on the abstract question as to whether a great increase of rent would not bring the case within the operation of the section. All he need say was, that the Court were unanimous in holding that the applicant here had failed to show that he could be considered a tenant from year to year, that the lease contained unfair or unreasonable covenants, or that threats of eviction had been employed to coerce him into an acceptance of it.

MR. COMMISSIONER LITTON concurred. The applicant had been badly advised in coming to the Court, and he would recommend those who thought it likely that the Commission would give a wide or loose interpretation to the statute to reconsider their position.

MR. COMMISSIONER VERNON said the facts, as disclosed in the evidence, left no doubt on his mind that the lease was valid, and should stand.

The application was refused, with costs.

Solicitor for the Tenant: *W. Ffrench Henderson.*

Solicitor for the Landlord: *P. J. Conway.*

DECEMBER 15, 1881.

DUNPHY AND OTHERS, TENANTS; LORD MOUNTGARRETT, LANDLORD.

Where tenants interfere with landlord's valuator, and prevent valuation, the hearing of their claim to have a fair rent fixed will be adjourned. Costs given against the tenants.

Mr. Holmes, Q. C. (with him *Mr. A. Samuels*), moved, on behalf of the landlord, that the application of the tenants to have a fair rent fixed should not be heard at the sitting of the Sub-Commission at Urlingford on December 17, as set down, but should be postponed to the next sitting of the Sub-Commission in Urlingford. The motion was grounded on an affidavit sworn by *Mr. Kidd*, the valuator employed by the landlord, which stated that, on going to value the lands on December 7, he was prevented from so doing by the threats of Dunphy and others of the tenants. The tenants, through their solicitor, *Mr. Fanning*, had, on the 8th December, withdrawn their opposition to *Mr. Kidd* valuing the lands; but in consequence of frost it had been rendered impossible satisfactorily to make the valuation since the occasion on which *Mr. Kidd* had been interfered with.

Mr. Adams, for the tenants, opposed the motion, on the ground that *Mr. Kidd*, having made no effort to value the lands since opposition was withdrawn, was not acting *bonâ fide*; he also urged that this was a motion proper to be made before the Sub-Commission.

MR. COMMISSIONER LITTON, in granting the motion, said that it was a proper motion to be made before that Court. The tenants were resisting what was plainly fair, and what no honest man could object to. The tenants of Ireland should know that, unless they treated their landlords fairly, and gave facilities for a proper valuation of their holdings, they could not expect to be treated with consideration by their landlords or

by that Court. To mark his sense of the tenants' conduct, the motion would be granted, with one guinea costs against each of the tenants.

DECEMBER 17, 19, 1881.

JOHN FALCONER *v.* CAPTAIN JAMES CRAMSIE
(REVISED) (1).

Mode of service of originating notices—General Rules 27 and 28—Whether service of notice upon the landlord's agent should be personal service—Right of appeal.

Motion to set aside originating notice to fix fair rent:—*Held*, that service on the clerk of the landlord's agent in his office was good service of the originating notice.

THIS was an application on behalf of the landlord for an order that the originating notice be set aside, and the abstract thereof erased from the books of the Land Commission, inasmuch as said case is not properly in Court for hearing, no notice having been served upon the landlord, as provided by the Land Law (Ireland), Act, 1881, and the Rules thereunder. The affidavit of service set out that the originating notice had been served on the clerk of the land-agent in the land-agent's office.

Monroe, Q. C., appeared for the landlord.—Service on the land-agent must be personal. General Rule 24 requires service on the landlord or tenant, or other persons sought to be bound by the decision of the Court. General Rule 27 requires service to be either personal or to be effected by leaving a copy with certain persons at the house of the person intended to be served. The expression "person intended to be served" on the landlord's side is applicable only to the landlord himself, and not also to the agent. Where substitution of service is ordered by the Superior Courts, the service must be personal.

John Ross, for the tenant.—General Rule 28 directs that service upon the land-agent shall be deemed good service upon the landlord. The word “service” cannot be taken in a more restricted sense at the beginning of the Rule than at the end. Service is a technical word, and is defined in Rule 27; therefore, any of the methods mentioned in that Rule must be effectual in the case of the agent. The expression “person intended to be served” can be applied to either landlord or agent. It is clearly applicable to either in Rule 31. The practice of the Superior Courts affords no analogy. The land-agent to whom the rent is paid occupies a peculiar position, and a special Rule as to service of notices upon him has been made. The existence of a separate Rule as to the land-agent shows that another method of service is not merely indicated, but that, so far as service of notices is concerned, the agent is intended to be exactly in the same position as the landlord.

The present motion on behalf of the landlord shows that the service, however effected, has been effectual.

Monroe, Q. C., replied.

Cur. adv. vult.

DECEMBER 19.

MR. JUSTICE O'HAGAN, in delivering the judgment of the Court, said:—

An application was made in this case for an order that the originating notice served in this case be set aside, and the abstract thereof erased from the books of the Land Commission, inasmuch as said case is not properly in Court for hearing, and no notice has been served upon the landlord, as provided by the Land Law (Ireland) Act, 1881, and the Rules made thereunder. The originating notice in this case is a notice to fix a fair rent. The landlord is Mr. Cramsie, who resides at Portsmouth, in England; and his agent is Mr. Richard Douglas, of Port Balintrá, in the county of Antrim. The affidavit of service of the originating notice is by Thomas M'Laughlin, who deposes that, on the 8th of November, he served Mr. Douglas, the known

agent and receiver of the landlord, to whom the tenants' rent was paid, with the originating notice, by leaving a true copy of it with the clerk of Mr. Douglas, at the office of Mr. Douglas at Kinchemboy, in the county of Antrim. This is the service which the landlord impeaches; and the ground is, that under our Rules, if the landlord were served through his agent, the agent should be personally served. Now, in the first place, I have to observe that no affidavit whatever has been sworn by or on behalf of the landlord. It has been laid down in several cases, among which I will only refer to *Emerson v. Brown* (1), that the Court will not set aside proceedings on the ground that the defendant has not been personally served with process, unless it be distinctly shown that it has not come to his hands. On this ground we should, as a matter of discretion, refuse this motion. But we should be sorry to decide it upon any ground so narrow, inasmuch as we are of opinion that the service was perfectly good service within the meaning of our Rules.

The mode of service prescribed by the 27th Rule follows, with some verbal variations to make the sense more clear, the mode of service prescribed by the Civil Bill Act of 1851, or the service of civil-bills. That is to say, service is to be either personal or by leaving a copy thereof with a relative or servant of the person intended to be served. But inasmuch as in the case of landlords who receive their rents through agents, those agents are really the persons with whom the tenants have to deal, we permitted the agent to whom the tenants' rents were paid to be served in place of the landlord. We therefore provided by the 28th Rule, that when the person intended to be served was the landlord, service on the agent to whom the rent was usually paid shall be deemed sufficient service on the landlord. But what is service on the agent? Mr. Monroe says it must mean personal service alone. We say no such thing. It means service as we have defined service in the preceding Rule. It is substantially to the same effect as the 7th of the Judges' Rules under the Act of 1870, which

prescribes that the service of notice of claim on any landlord, or in his absence on his known agent, shall be effected as now by law prescribed for the service of ordinary civil-bill processes, with the difference that we do not require the landlord to be absent to make service on the agent sufficient. Accordingly, in the 29th Rule, we deal with service by registered letter, directed to the landlord or to the agent; and in our Forms—Form 7, Form 9, and a number of others—the signature is directed to be by the landlord or his agent. In truth we have, so far as was in our power, made the agent the landlord's representative for the purposes of the Act. It has been said by Mr. Monroe that when an order is made by one of the Superior Courts directing substitution of service, the service should be personal on the person directed to be served. Certainly; but this is not a question of substitution of service; it is a question what mode of service has been prescribed by our Rules. We have no doubt whatever that the service was good, and must refuse this motion with costs.

Mr. Monroe has asked us for leave to appeal. Now we are desirous in every case to enable the parties aggrieved by our decision to bring their rights before the Court of Appeal. But I have sought in vain for a single case in which the decision of a Superior Court, as to what constitutes due service of process pursuant to its Rules, was brought for review before a Court of Appeal. This is not a question of law, such as is contemplated by the 48th section of the Act. It is a question of practice and procedure, which the Court of Appeal would hear opened with amazement. They would, in my opinion, say that the Judges of the Court of the Land Commission were the best interpreters of the meaning of the Rules which they themselves had framed. We have no doubt whatever on the question, and we think it is no case for an appeal.

Solicitor for the Tenant: *W. G. Murphy.*

Solicitors for the Landlord: *Messrs. Cramsie & Greer.*

DECEMBER 20, 1881.

EWART *v.* GRAY (REVISED) (1).

Application under section 21 of L. L. (Ir.) Act, 1881, seeking to have a lease, made after the passing of the Landlord and Tenant (Ireland) Act, 1870, declared void, on the ground that it contained terms which were unreasonable and unfair, having regard to the provisions of the said Act, and as having been procured by threat of eviction. Evidence of what is threat of eviction:—*Held*, that the provisions of the lease, taken in their entirety, amount of rent, as well as everything else, will be taken into consideration in determining whether the lease contains terms unreasonable and unfair to the tenant, having regard to the provisions of the Landlord and Tenant (Ireland) Act, 1870.

And—*per* LITTON, Q. C.—that the reservation of an exorbitant rent is, in itself, a term of the lease which the Court is bound to regard, and which may be unreasonable or unfair to the tenant, having regard to the provisions of the Act of 1870.

THIS was an application, on behalf of the tenant, seeking to have his lease of the lands of Tullygawley, in the county of Antrim, set aside, as it contained terms unreasonable and unfair to the tenant, and that its acceptance was procured by threat of eviction, and undue influence. The facts of the case are fully set out in the judgment of MR. JUSTICE O'HAGAN.

W. H. Dodd, appeared for the tenant.

James Orr, for the landlord.

O'HAGAN, J.:—

In this case, in which Thomas Ewart is tenant of the lands of Tullygawley, in the county of Antrim, and James Gray, representative of the late Major Gray, is landlord, an originating notice has been served, seeking, under the 21st section of the Act, to have a lease accepted by the tenant after the passing of the Landlord and Tenant (Ireland) Act, 1870, declared void,

on the ground that it contained terms which were unreasonable or unfair to the tenant, having regard to the provisions of that Act, and that its acceptance was obtained by Major Gray by threat of eviction, and undue influence. The originating notice states, as the terms complained of, that the tenant had to sign away the benefits secured by the Land Bill of 1870 ; and states further the exorbitant rent. The holding is stated to contain 36 acres, statute measure. The rent is £33, and the gross poor-law valuation is £20. The lease complained of is a lease of the 25th of September, 1875, from George Gray to Thomas Ewart, of part of the lands of Tullygawley, in the county of Antrim, as delineated by a map indorsed on the lease ; to hold for a term of thirty-one years from the 1st of November, 1874, at the yearly rent of £33, payable every 1st of May and 1st of November, free of all deductions, except the landlord's proportion of the poor rate. There is a covenant against assigning, subletting, or setting in conacre, or bequeathing the holding to more than one person, without the consent of the landlord ; a covenant not to build any dwelling or other house unsuitable to the holding, or to use the premises as an inn, tavern, or public-house, without the assent of the landlord ; and to keep all buildings in good and proper repair, and so to yield them up at the end of the term. There is also a covenant enabling the landlord to enter and give notice to repair ; and if the repairs were not executed by the tenant, the landlord should have the power to re-enter, to execute the repairs, and recover the amount from the tenant as rent. There is a further covenant to spend upon the ground all muck, dung, &c., and to leave the same upon the ground at the end of the term. There is a proviso for the absolute cesser of the lease upon breach of any covenant, and there is also an express covenant by the lessee to pay the whole of the grand jury cess.

Prior to the granting of this lease, Thomas Ewart was indisputably tenant from year to year of his holding. His ancestors had held it, he says, for nine generations, which would bring us back to the plantation of Ulster. At the time of the earliest memories of the tenant the rent was £16 ; it was after-

wards, some time about 1850, raised to £19. The rent of £19 was made up of £1 for a particular field, and £18 for the rest of the farm. The rent of £1 for the field was in a few years afterwards raised to £4 10s., making the entire rent £22 10s., at which figure it remained until the granting of the lease. It would appear from the evidence of Mr. Boyd, the agent, that the land had, after the death of the tenant's father, been divided; that the present tenant's brother held the greater part of the farm, and he himself only about 7 acres, and that he purchased from his brother in 1865 or 1866. Now, the account which the tenant gives as to what had been done on the farm is as follows:—

He says part of it was called a barren hill, which no man thought would be laboured. He says it was he himself who reclaimed the worst of it; that his father reclaimed the easiest parts, and left things that he thought never would be done—things which he himself afterwards did. He described the buildings which he and his father erected on the farm, namely, a farm-house, a slated byre and a stable, to which, he says, the landlord did not contribute one farthing. The land, he says, was, when he remembered it first, bad grazing ground, stony and heathy, and high ground. There were what he termed “the four old original acres.” He did not explain exactly what he meant by this, but I would infer that he referred to the 7 statute acres which he held before he purchased from his brother. Now the tenement valuation, which was made in 1862, was £20 for the entire holding, that is to say—for the land £18 5s., and for the buildings £1 15s. I may say that on this question of the improvements, which he alleged were effected by himself and his father, the tenant was not cross-examined. A neighbour of his, named Powell, deposed that he knew Ewart's land for thirty-five years, that he knew it in his father's time—that it was very rough ground—that the tenant was a very improving tenant—that he knew of his own knowledge of his having reclaimed portions of it—large portions, that he could not fix the time, because he was doing it from one time to another—that he believed he did the most himself, that his

father did some of it.' Mr. Boyd, the landlord's agent, was not on his direct examination asked any questions as to whether the tenant had been an improving tenant. On his cross-examination he is asked whether he knows the holding, and whether improvements have been made on it, and he says "yes"; and whether the tenant is a good tenant, and he answers, "a most excellent man." It is therefore a clear conclusion in our minds that the tenant and his predecessors in title had effected considerable improvements upon the holding, not only by the buildings—which we do not take much into consideration, because on Mr. Boyd's evidence their value does not form a constituent part of the present rent—but also by gradual reclamation of the waste land and amelioration of the farm. Upon this point there is no discrepancy whatever in the evidence. I now come to the circumstances under which the lease was granted and accepted, concerning which there is considerable discrepancy. The tenant's version is this:—He says that two years before the lease, that is to say, in 1873, he was paying his rent to Mr. Boyd, the agent; the rent was paid annually in December. "Mr. Boyd said to me: 'the Major has raised your rent.' I said I was paying all that I could pay, and more than I could pay; because I was bringing every farthing of money that I had, and I had often to borrow some once in a while to make things up. He said: 'You should go up to the Major, and have an interview.' I did not go; I said, I had just paid all the rent I could pay. He said the Major was intending to give me a lease. I said we never had one, and did not need any." The tenant had an evident dread of the result of an interview with the Major, and did not go near him, and a year went by. The lapse of this year without any step being taken by the landlord is, I think, to be accounted for by a circumstance mentioned by Mr. Boyd, to which I shall hereafter advert. In the following December of 1874, as he was again paying his rent, Mr. Boyd reproved him somewhat sharply for not having gone to see Major Gray; and again the tenant said that he did not know what to do; that he had always paid his rent, and as much as he could pay; that it was too dear without

adding more to it. After those two admonitions from Mr. Boyd, Ewart in the following spring received a third, which could not well be neglected. He was served with a notice to quit, bearing date the 12th April, 1875, requiring him to deliver up possession of his farm on the 1st November following. More than a month afterwards, he received another document, dated the 20th May, 1875, informing him that the notice to quit was served for the purpose of raising his rent, and that his rent in future was to be £33.

It does not appear from the tenant's evidence that he had ever before this been informed verbally of the amount of rent to be put upon him. However this may be, the two documents taken together were of a very serious complexion, and under their pressure Ewart sought that interview with his landlord, which he had previously rather shunned than courted. He went to him in the month of August, 1875, and saw him in his own house, Mr. Boyd being present. The landlord, Mr. Gray, said "Who are you?" Mr. Boyd said, "This is Thomas Ewart, one of your tenants from Tullygawley." He said "he remembered me." Ewart then mentioned the fact of Major Gray having gone over the farm eighteen years before with Mr. Winder, the former agent, and observed upon its stony condition. He then proceeds with his narrative of the interview. "He (the Major) said 'We found your rent a little too low, and we have raised it, and I am going to give you a lease to secure you against further rises.' I said a lease would not make me abler to pay rent, that a lease was no good, and I would take none. I asked to be allowed to make statements to him of what I had done. I began to tell him that my land was about the worst that ever had to be broken up in our country, and I had done what the neighbours said was the greatest thing ever done, and after I had it done it was bad land still, though I made it better looking. I said it lies high, and the wind blows down the crops. He said he did not need me to instruct him, I was to accept his terms, 'Do you know that you are my tenant? I will put you out if you do not.' I was hurt about it, that I had done so much—and a man to put me

out after all; and I stood a minute and I said, 'that is the hardest thing I ever heard or read of. I am the ninth generation born there, and now you put me out, and I have a family of ten children and a wife, and no place to go to, and no money. He just turned round and said, 'Boyd, give him until Saturday to make up his mind, and if he accepts our terms, and takes a lease, he will get the stay,' that he did not need me any further.' This is Ewart's evidence. He yielded to the landlord's demand, and paid the rent of £33, as from the preceding gale day, November, 1874; but the lease was in fact not executed by him until three years after—November, 1878. The tenant's account of the delay is, that he never asked more after the lease for about three years, until Mr. Christy, the landlord's solicitor, met him one day in High-street, and told him there was the lease to be signed, and that he should go and get it signed and pay for it—that he said that he did not care if he never saw it—that Mr. Christy told him if he did not sign it he would have to bear the expenses of the Court, and that he would charge him twice as much as if he took it directly. That after consulting another solicitor, he signed it in Mr. Christy's office. He is asked on cross-examination if he did not ask Mr. Christy to get the lease for him. He says he did not, but that Mr. Christy told him to come and pay for it. He admits that he did ask Boyd to get him the lease about three years after the lease was first named; that Mr. Christy having told him that he would have to pay double if he did not take it then, he told Mr. Boyd to get the lease if he had to pay for it. He is also asked whether he did not say that he wanted the lease to borrow money on, but this he entirely denies. Now, we cannot conceal from ourselves that this narrative of the tenant is consistent with what is stated by Mr. Boyd and Mr. Christy. It is in entirely a question of recollection, for to none of them can any want of veracity be imputed. Ewart obtained the highest character from Mr. Boyd himself, and certainly in the witness-box he showed all the marks and characteristics of a serious and truthful man. Mr. Boyd says that in the year 1875, a survey was made of the estate by a Mr. Thompson, who is now dead;

that he surveyed Ewart's farm amongst others, and valued it first at £35, which increased rent Ewart was asked to pay, and refused. That before the service of the notice to quit no mention of a lease was made. He then states that he was present at an interview between Ewart and Major Gray, which he fixes as having taken place in the late summer-time of 1875; and in this he and Ewart agree. He is then asked if he recollects what took place at that interview, and he answers "I do not indeed." He is then asked if he recollects anything at all. He says "I recollect they had a conversation about the rent, and Major Gray told him his farm was cheap and he would increase the rent, but he did not tell him he would put him out. Of that Mr. Boyd was perfectly sure; he says he does not remember any mention of a lease at that interview. His recollection is that the first mention of a lease was made in 1875, when Ewart was paying the first year of the increased rent, which ran from November, 1874. He adds, that decidedly the first proposal for a lease emanated from Ewart; that he said he would take a lease, but Major Gray wanted £35 for the holding, and refused to sign the lease for three years unless the rent should be £35 a-year. He then states that Thompson made two valuations, one in 1873 at £35, and the other in 1875 at £33. That Major Gray had a regular tariff for granting leases, viz.:—An increase of 2s. 6d. the statute acre for thirty-one years, and 5s. the statute acre for sixty-one years. He says that when Ewart proposed in December, 1875, to take a lease, he, Mr. Boyd, promised to speak to Major Gray. That he told Ewart what Major Gray said, namely, that he wanted £35 for the farm, and that it was agreed, probably in 1876, that he should have the lease. That it was there agreed that he should have the lease at £33, but that Major Gray refused to sign for three years.

Now, if Mr. Boyd's narrative of the sequence of events be correct, the tenant's case would encounter a most formidable obstacle; for if the tenant, succumbing to the pressure of the notice to quit, agreed to the increased rent without any reference to a lease, and if the proposal for a lease afterwards

emanated from himself as an independent transaction, it would be difficult indeed to hold that the acceptance of the lease was procured by threat of eviction or undue influence. We have dismissed a case on that very ground. But can we rely on Mr. Boyd's memory? In the first place, who is more likely to preserve a recollection of the facts, and, above all, of the important interview in August—Mr. Boyd, to whom this was but one among a multitude of dealings with tenants over an estate of nearly £6000 a-year, each of whom was to him of comparatively small importance—or the tenant, to whom it was possibly the most momentous event of his life, when the choice was given him of paying an addition of almost fifty per cent. or quitting the farm which he and his had held for close on 300 years? Again, Mr. Boyd's own admissions show plainly that he has nothing in the nature of a distinct recollection of the transaction. He stated so in the beginning of his direct examination; and in cross-examination, in answer to Mr. Dodd, who asked him whether he could recollect positively that in the interview of August there was not a word said about a lease, he answered, "I cannot say that." He is further asked by Mr. Dodd when instruction was given him to prepare the lease, and he answered, "In the year 1876; I think early in 1876." "Are you trusting to your recollection, or have you any date to go upon?—None whatever. Are you perfectly certain it was in 1876?—No. Will you swear it was not in 1875?—No. Will you swear it was not in 1874?—No, I will not. You won't swear there was not a reference made to a lease before the first interview between Major Gray and the tenant?—Yes. Your evidence now is that you won't swear there was not something said about a lease before that interview in 1875?—Yes. And it may have been in 1873?—It might."

It is plain that Mr. Boyd's recollection on the whole subject utterly fails him; nor is it, as I said, wonderful that it should. But the documents themselves furnish the strongest evidence. The lease has a stamp, with the date of issue, 26th April, 1875. Mr. Christy, the solicitor, says that the lease was engrossed on a purchased stamp, and that, so far as he can

recollect, he got instructions to prepare the lease about April, 1875. But as to the lease itself; it is a lease duly engrossed, tenant's part and landlord's counterpart. The lands are stated not as subsequent insertions, but part and parcel of the original engrossment. The acreage is stated, and the *habendum* is "To hold for the term of thirty-one years from the 1st November, 1874, yielding and paying the yearly rent of £33" (the rent being no subsequent insertion, but portion of the original engrossment), "payable half-yearly, on the 1st day of May and 1st day of November in every year; the first of such half-yearly payments to be made on the 1st day of May, 1875." The time of the beginning of the lease is cast back to November, 1874, and the first payment is to be made in May, 1875, thus capturing the coming May gale. It seems to us little short of demonstration that that lease was an engrossed though not executed instrument prior to the 1st May, 1875. What, then, becomes of Mr. Boyd's theory that the first mention of a lease emanated from Ewart himself in December, 1875, or of the view that at the time of the notice to quit, or of the notice of May, 1875, or of the interview of August, 1875, there had been no thought of a lease, or of the idea that the rent contemplated by Major Gray throughout the year 1875 down to 1876 was £35 and not £33? I think it not unlikely that the idea of £35 was in Major Gray's mind during the year 1874, and that some hesitation on that point was the cause of his inaction during that year. But the evidence of the engrossments, in my opinion, completely confirms the statements of the tenant that when, in December, 1873, the rise of rent was mentioned, the intention to give a lease was also mentioned, and that in the interview of August, 1875 (the engrossments, with rent and all fixed, being then in Mr. Boyd's possession), Major Gray did say, "We intend to give you a lease, to secure you against any further rises of rent." The rise of rent and the lease were not two distinct and independent things, as Mr. Boyd's memory now tells him. They were one thing and one idea from the beginning. In saying so, I do not leave out of account what Mr. Christy tells us. Mr. Christy's evidence, I am bound to

say, is wholly irreconcilable with Mr. Boyd's evidence as to the first mention of a lease being in December, 1875. Mr. Christy says that about the time of the preparation of the lease, and after he had been instructed by Mr. Boyd, Ewart called upon him, and gave him to understand that his reason for getting a lease was that he might require to borrow a little money. Now the time of the preparation of the lease must have been before May, 1875. The notice to quit was in April; the notice to pay the increased rent was in May; the first time Ewart came face to face with his landlord was in August, Ewart still bitterly contending against any increase of rent; and yet Mr. Christy, who, I may observe, as well as Mr. Boyd, professes to speak wholly from memory, would tell us that in the spring of 1875 Ewart came in to him, and spoke about his getting a lease. That at some time before the actual execution of the lease, in 1878, Ewart may have asked for the lease, and stated that he might obtain money on it, may be true enough; but Mr. Christy, who, like Mr. Boyd, does not refer to a single book or document, but depends altogether on his recollection, is, in my opinion, entirely astray as to the date. And, when Ewart was bound, as he was bound by his agreement, to yield to his landlord's demands; when he had paid the rent reserved by the lease, and from the time mentioned in the lease, there is nothing, I conceive, in the fact of his asking that at least he should get the document embodying the contract which proves that the contract itself was not on his part a most reluctant one. Mr. Orr said to Ewart in cross-examination: "You wanted the lease then?" and his answer to me is very intelligible—"Was I not paying £33, and I had either to take it or pay dear for it." He says Mr. Christy urged him to take out the lease, stating that he would charge him at a less rate than than he would afterwards do; and this, in my opinion, derives confirmation from what Mr. Christy himself says, namely, that the sum of £5 which he charged for the lease was less than the usual legal fee.

On the whole, we have come to the conclusion, with very little hesitation, that the acceptance of the lease by Ewart was procured by the threat of eviction.

But the question remains, whether the lease contains terms which at the time of its acceptance by the tenant were unreasonable or unfair to him, having regard to the provisions of the Act of 1870. And this question is no doubt a very serious one, and one requiring very careful consideration of the real meaning of the enactment we have to construe. It has been urged, that the leases which the legislature had in view were those containing covenants or conditions purporting expressly to debar the tenant from claiming compensation under section 3 or section 4 of the Act of 1870. Leases of that character, it was said, were those which the Court obtained power to annul. To this it was answered, that so limited a construction would render the section in effect nugatory. For if the lease were made to a tenant the aggregate of whose holdings is valued under £50, any stipulation purporting to prevent the tenant claiming for disturbance under section 3, or for certain improvements under section 4, is made absolutely null and void. It is difficult to conceive that the legislature meant either to strike at claims which were already annulled by the statute of 1870 itself, or that it only regarded leases to tenants valued at £50 or over. The following dilemma was put to us: How can you call such a stipulation unfair to a tenant valued below £50 when it is a nullity? How can you call it unfair to a tenant valued above £50 when it is authorized by the statute? We are of opinion that a wider construction must be given to the 21st section of the Act of 1881; and that if the terms of the lease, taken in their entirety, are unreasonable or unfair to the tenant, having regard to the provisions of the Act of 1870, and the rights of the tenant under that Act, such a lease may come within the class which we are empowered to set aside. It has been urged that the Court cannot take into account the amount of the rent in judging whether the terms were unfair, because the section enacts that when the lease is set aside, the tenant shall be deemed tenant of a present ordinary tenancy from year to year, at the rent mentioned in the lease. It is argued that, by leaving the rent unaltered, the legislature showed that what it had in contemplation were certain oppres-

sive clauses tending to frustrate the benefits of the Act of 1870. But a consideration of the policy of the Act, as shown by the previous sections, will displace that argument. To every tenant of a present tenancy from year to year is given the right to have a fair rent fixed for his holding. But no such right is given to leaseholders during the currency of their leases. They are held bound by their contracts. If, however, a lease obtained since 1870 was both unfairly obtained and unfair in itself, with regard to the provisions of the Act of 1870, then the legislature thought that the tenant should be freed from the fetter of the lease altogether, and be placed in the same situation as a present ordinary tenant, with the same rights of having a fair rent fixed for his holding, and of acquiring a statutory term. If the legislature had only in view obnoxious clauses in the lease, apart from the rent, then its object would have been fully attained by giving the Court power to strike out those clauses. But by empowering the Court to annul the lease altogether, and to enable the tenant to have a fair rent fixed, the legislature has, we conceive, shown that the lease in its entirety, rent as well as everything else, was to be considered.

Now, in the first place, what was the position of the tenant just before the agreement for the lease? He held as tenant from year to year a holding valued at £20, at a rent of £23 10s. He was therefore entitled, if disturbed by the act of his landlord, to claim five years' rent as compensation for disturbance. His father had made improvements on the farm, both by buildings and by reclamation of land. He himself had made further improvements. For the value of all these he was entitled to be paid. It is somewhat singular that on neither side was the question asked whether the holding was subject to the Ulster custom, and accordingly we take the rights of the tenant to be those existing under the 3rd and 4th sections of the Act of 1870. Now, what are the terms of the lease? The increase of rent is *primâ facie* immense, close on fifty per cent. above what the tenant had been paying, and more than one hundred per cent. above the rent which had been paid in the tenant's early days. And this increase was made on a tenant admitted to be

an excellent and improving tenant of a holding on which, so far as appears, the landlord never expended a shilling. This increase of rent was based on Mr. Thompson's valuation. Mr. Thompson is unfortunately dead. Mr. Boyd, the agent, says the valuation was made exclusive of the improvements. He says so without hesitation as to the buildings. He is then asked whether the reclamations were excluded. To this he gives no direct answer, but said, "Oh, as to the reclamations!" And then proceeded to state what the tenant had made by the sale of turbary; and as it so happened, neither counsel brought him back to the point. I asked him whether he meant that the land was valued as it then was, with the exception of the buildings. I thought his answer to me was in the affirmative, "I do, my Lord." But the shorthand writer has taken it down in the negative, "I do not." He probably did not quite understand my question, for he goes on to say "There is a large slice of the holding wants to be reclaimed still. Thomas Ewart got from Mr. Winder, he has informed me himself, ten acres of bog or turbary, out of which he has been living for the last twenty years, and during the coal famine that man made a little fortune out of the bog." Mr. Dodd asked him whether he was charging him rent for that bog, and he answered "surely it is part of his holding." And therefore he has had it in your opinion far too low? "No," Mr. Boyd answers, "it is a fair rent now." And MR. COMMISSIONER VERNON said to him "You say that he made a good deal of money of turf," and he answered "he did, and does still." He is asked, whether that is not contrary to the terms of the lease? he answered "I really cannot tell you. It is deep bog for turbary." I asked him whether it was with his permission Ewart did that, and he answered, "Oh, yes." Now, if the rent which Mr. Boyd considers a fair rent were based, as would appear to some degree, upon the gains made by the tenant by the sale of turf, the tenant has not one hour's security for that right. Major Gray may be too honourable a man to deprive him of it, but who can answer for his successors? The 29th section of The Landlord and Tenant Act of 1860, expressly debars a tenant from cutting or using turf bog

for profit or sale, unless the right so to use and enjoy it was expressly granted in writing by the landlord. The lease is absolutely silent on the subject, and the tenant might be prevented at once by injunction from selling a particle of turf, and might possibly have to purchase the right by a further increase of rent. If the rent was measured on that basis, it would have been only fair to embody it in the lease.

But we add that we think it almost inconceivable that Mr. Thompson could have valued the farm irrespective of the tenant's improvements on the land. How was he to know them? How was he to know the previous condition of the land? The tenant who made them appears never to have known of the valuation until it appeared in the formidable result. Mr. Boyd does not say that he spoke a word to Mr. Thompson on the subject, and Mr. Boyd himself was there but for a comparatively short time. It has been said that the amount of the rent is outside the scope of the section with which we are dealing. It is true that we are not engaged in fixing a fair rent, but inquiring whether the lease contains terms unfair to the tenant, having regard to the Act of 1870. And it seems to us that if the tenant had acquired under the Act a property in the holding, as he undoubtedly did, and if a rent were imposed by lease, of an amount sufficient, or more than sufficient, to countervail the property so acquired, we cannot leave this out of account in judging of the fairness of the terms, having regard to the Act of 1870. Again, this lease purports to be a lease for thirty-one years. If it be so in fact, the tenant would on its termination be deprived of all compensation for disturbance, and, to a partial extent, of compensation for improvements. And it may be argued, that inasmuch as the reserved rent of £32 was duly paid from the 1st November, 1874, the lease should be treated as one having its beginning at that date. Although I do not concur in this view, and am of opinion that the lease must be deemed to have its commencement at the earliest as of the date when there was a binding contract for a lease, yet the tenant would be likely to find the point litigated at the end of the lease. But further, some of these improvements were made by

the tenant's father while he was tenant from year to year of the holding. Now under the authority of the case of *Holt v. Lord Harborton* (1), the effect of taking the lease, whatever the term may have been, was to preclude the tenant from claiming in respect of the improvements made by his father. This would be no longer so under sect. 7 of the Act of 1881; but we must judge of the lease as it stood at the time it was made.

The lease itself is in the most stringent terms, evidently taken from precedents in use in England, and not at all adapted to the customary relations between landlord and tenant in Ireland. I will refer to one clause in particular. There is a proviso that if there should be a breach of any covenant contained in the lease, the landlord might re-enter, and thereupon the term thereby created should absolutely cease and determine. So that if the tenant should let the smallest particle of the lands in conacre, or fail to spread and use on the premises all the manure, muck or dung raised upon it, or fail to keep in due and proper repair all buildings, and also all bridges, gates, palings, rails and fences, watercourses, dykes, dams, ditches, &c., the landlord might at once put an end to the lease, and evict the tenant. A clause of this kind may possibly be fairly enough inserted in a lease where there is a mere arrangement for the hire of the land as a temporary commodity. But where, as in the present case, the farm was the tenant's patrimony, it was, in my judgment, an unfair and unreasonable clause, and not only unfair and unreasonable in itself, but unreasonable and unfair to the tenant, having regard to the provisions of the Act of 1870. For if, as I have shown, there were rights acquired under that Act, namely, the right to the value of the improvements made by his predecessors in title, which were forfeited by the mere fact of taking the lease, surely it was unfair that the lease, which if a fair lease should be a substitute for the rights thus lost, should be so framed as to be practically a lease at the will of the landlord. It is quite true that these extravagant clauses of forfeiture were very seldom sought to be

(1) Ir. R. 1 R. & L. A. 82; 6 Ir. L. T. R. 1.

enforced. I only remember one instance in which the attempt was made, and I am glad to say it failed. But we have to deal with the terms of the lease, and not with the probabilities of their being enforced—probabilities which might on any day undergo a complete change. The clause of forfeiture is not specifically referred to in the originating notice. But as we have no formal pleadings, and have ample power of amendment, this omission does not, I conceive, prevent us from taking it into consideration. There is another clause to which I advert only because it was adverted to in argument, namely, the clause which throws the burthen of the entire grand jury cess on the tenant. I frankly say I do not lay any weight on this clause; both because it was only a continuance of a liability which had previously existed, and because, according to the case of *Powerscourt v. Mitchell* (1), the result would have been the same if that clause had been omitted, the tenant having been in occupation previous to the lease. But taking all the terms of the lease—the great increase of rent, sufficient, in our opinion, to countervail, or more than countervail, whatever interest in the land the tenant had under the Act of 1870—the loss by reason of taking the lease, of the value of all improvements not actually executed by himself, and the stringent and severe clauses of the lease, rendering the tenure under it most precarious, so far as legal rights are concerned, we have unanimously come to the conclusion that this is a lease containing terms unreasonable and unfair to the tenant, having regard to the Act of 1870: and, being of opinion that its acceptance was procured by the landlord by threat of eviction, we will declare it to be void as from the date of this order.

MR. COMMISSIONER LITTON, Q. C.:—

No one who has paid attention to the evidence in this case can entertain a reasonable doubt that the lease of 25th September, 1875, was “procured by the landlord by threat of eviction.”

(1) 4 L. R. I. 82.

To believe that Thomas Ewart signed a lease containing the covenants which have been referred to, and reserving a rent raised from £22 10s. to £33, except under the urgent necessity of having to choose between submitting to the terms imposed by his landlord and quitting his holding for ever, is, I think, simply impossible, if we are to regard the principles of common sense which usually regulate men's actions.

It is unnecessary to dwell upon this part of the case, but I wish to make one or two observations on the terms of the lease itself, as applicable to this and similar cases.

To bring any particular case within the 21st section, the lease must contain terms which were at the time unreasonable or unfair to the tenant, having regard to the provisions of the Act of 1870.

I am of opinion, that the reservation of an exorbitant rent is in itself a term of the lease which the Court is bound to regard, and which may be unfair and unreasonable to the tenant, having regard to the Act referred to.

It is manifest that rent, if forced up to a sufficient amount, must of itself destroy whatever property the tenant has in his holding, or whatever right the tenant has under the Ulster custom, where such custom prevails.

The Act of 1870 aimed at securing the tenant by providing compensation for improvements and compensation for disturbance. And in considering the question whether any and what pressure has been brought to bear by the landlord on the tenant to compel him to accept a lease, where we find the tenant yielding to a large increase of rent, and if the facts of the case disclose anything equivalent to a threat of eviction, we ought, I think (speaking for myself), to draw the inference that the acceptance of the lease was due to the tenant's inability to resist a demand the refusal to accept which involved the loss of his holding, and that the large increase of rent was unfair and unreasonable within the 21st section of the Act.

The 3rd section of the Act of 1870 provided compensation to be paid to a tenant disturbed by his landlord—for the loss the Court should find to be sustained by the tenant by reason of

quitting his holding—and the compensation was to be awarded accordingly. This provision has been repealed by the 6th section of the Act of 1881; but between 1870 and 1881, the effect of forcing up the rent of a holding was to deprive the tenant of compensation in direct proportion to the increase of rent—the higher the rent the less must be the loss sustained, and the less the loss sustained the less the compensation to which the tenant would be entitled. Having regard to the Act of 1870, and the decision in *Holt v. Harberton* (1), nothing more was required in order to destroy the benefits intended to be conferred by the Act, than to procure the acceptance by your tenant of a lease for thirty-one years at a rack-rent; and wherever any part of the rent so reserved represented the value of the holding as improved by the tenant, nothing could be more unfair or unreasonable, having regard to the provisions of that Act.

With regard to the covenant in relation to county cess, I do not think that such a covenant, standing alone, can be considered as unfair or unreasonable. The Act of 1870 contemplated that the parties should contract regarding its payment, and it appears to me to be merely a question of more or less rent; but as such, the presence or absence of the covenants may, and in some cases must, have some bearing on the reasonableness of the rent reserved, having regard to the rights of the tenant under the Act of 1870, immediately prior to the execution of the impeached lease.

I only desire to make one other observation, and that is, on the forfeiture clause. I do not think a forfeiture clause is unreasonable or unfair if limited to breaches of covenant of the character of the statutory conditions set out in sect. 5 of the Act of 1881; but when most minute and almost harassing provisions are inserted in a lease relating to the manner in which the holding must be used and enjoyed, and when the forfeiture clause is made applicable to the most trifling and insignificant breach, in such a case I am fully prepared to hold the clause to be unfair and unreasonable. I think it is so in the present

(1) Ir. R. 1 R. & L. 82.

case, and I entirely concur in the conclusion that the lease of 25th September, 1875, should be set aside.

MR. COMMISSIONER VERNON concurred in the judgments of the Court.

Solicitor for the Tenant : *J. H. Currie.*

Solicitors for the Landlord : *A. O'Rourke & Son.*

DECEMBER 24, 1881.

HONOR KELLY, TENANT ; WILLIAM GRIFFITH,
LANDLORD (REVISED).

*Application to declare lease void under L. L. (Ir.) Act, 1881, sect. 21—
Tenant not having the legal estate but being the equitable and beneficial
owner of the lease entitled to apply under 21st section—Notice to quit or
other legal proceeding not necessary to constitute threat of eviction—
Excessiveness or lowness of rent will be considered as guide to fairness of
other terms in the lease.*

Where a tenant from year to year was compelled, under threat of eviction, to take a lease for one life at an excessive rent, and in addition to pay a fine :—*Held*, that the lease was unfair, having regard to the Act of 1870, and it was declared void from date of order of Court.

[THE facts of the case are set out in the judgment of the Court].

Mr. George Kelly, for the tenant.

Mr. Bird, for the landlord.

O'HAGAN, J. :—

In this case an originating notice, bearing date the 25th October, 1881, was served, seeking to have a lease of the 29th September, 1872, declared void, upon the grounds that it contained terms which were, at the time of such acceptance, unreasonable and unfair to the tenant; namely, that the tenant was

compelled to accept said lease at the yearly rent of £67 11s., which was and is excessive, and not a fair rent; and the said tenant was compelled to pay £150 as a fine, which was not stated in the said lease, and should have been taken into consideration in reducing said rent; and that the acceptance thereof was obtained by threat of eviction. Portion of the above statement is an error. The fine of £150 is stated on the face of the lease. The lease is one not made to Honor Kelly herself, but to her son Edward Kelly, for the life of the Duke of Cambridge, at £1 12s. 6d. per Irish acre; but by a declaration of trust signed by him, and bearing date the 23rd of March, 1877, he declared that he obtained the land as a trustee for his mother, Honor Kelly. A good deal of evidence was gone into to show that she was regarded as the tenant from the time of the lease; and one curious feature in the case was, that for some years after the lease the receipts were given neither to the son, who was the lessee in trust, nor to the mother, who was the *cestui que trust*, but to the representative of the deceased husband of Honor Kelly. There is no doubt that Honor Kelly remained in occupation of the house and farm throughout, and that it was she who cultivated and managed the latter. Her son, the actual lessee, was a shopkeeper in Collooney. He is now in America. The declaration of trust is before us, an unimpeached instrument upon which we must act. Although the legal estate is in him, the legal and beneficial owner of the lease is Mrs. Kelly, who is in the actual occupation of the lands. Therefore, though not having the legal estate, she is, in our opinion, a tenant entitled to apply under the 21st section of the Act. The husband of Honor Kelly died on the 4th April, 1861. The old rent was £32 15s. 6d. a-year, about 16s. the Irish acre. The valuation of the premises was £45. It is alleged that her husband held under a lease. So far as we can collect, this was so; but no evidence sufficient for us to act upon as regards the terms, or duration, or determination of this lease appeared before us. The payment of rent being proved before the execution of the present lease, the presumption is that there was a tenancy from year to year, until the contrary is proved. The

burthen of proof is on the landlord; and all that he says is that his father's documents were somehow lost or stolen at the time of his death, but he cannot speak as to the terms of the former lease. After her husband's death in 1861, Mrs. Kelly continued in occupation of the premises, and paid the rent, although the receipts were given in the name of the representatives of Michael Kelly.

In September, 1871, there was a demand of possession by a bailiff of the estate, named Edward Kelly. She refused to give up possession. Afterwards she says Captain Griffith himself and his agent came to her house, in the year 1872. Captain Griffith asked her what she was going to do about her land, and she told him she intended to keep it if she possibly could. He told her she could not expect to have it at the old rent. "I said I thought it was plenty for it, when I myself made the improvements. He said I would not have it at that. He told me to say what rent I would give. I told him I thought the old rent was sufficient. He said that won't do, I can get double the rent and £250 of a fine. I told him I would not give that, because I could get no money. Then he said you will not get it. When he was leaving I told him I would give Griffith's valuation, and I could not give more than £1 an acre. He left my house, and he and my son had whatever more talk there was about it."

The next matter she deposes to is as to what occurred in the office of Mr. Molony, the solicitor, in Sligo, who is now dead. Mr. Griffith, according to her account said to her, "Now Mrs. Kelly, I am going to sacrifice £100 on your account, and I will take £150 and double the rent." She says they had then the lease in their hands, but she herself was not present at the actual execution of the lease, which, strange to say, never appears to have been executed by the lessee at all.

Captain Griffith, and Mr. Palmer his agent, were examined; Mr. Griffith says he never dealt with the old woman, but with her son, and that her son, who was a shopkeeper in Collooney, came to him in 1872, after the lease fell in, and asked him for a new lease. Captain Griffith said he would be very glad to

give it to him, but could not give it to him at the same rent his father had it, that he had it very cheap. He told him to send in a proposal; that there was another man, who is a large tenant of his on an adjoining farm, most anxious to get it. Captain Griffith further said he would double the rent, and that Kelly must give him a fine for the buildings. I will revert to the question of the buildings. At present I am dealing with the circumstances under which the lease was accepted. Mr. Palmer says he valued the farm, and put on it 32s. 6d. an acre. He was asked whether any objection was made by the tenant, and he answers significantly "There was the usual conversation, and I think the end of it was, he wanted me to leave the rent at 30s." "Was anything said about a fine?—Yes, Captain Griffith wanted £250; and I think I was partly the means of inducing him to take £150." We are of opinion, that although there was no notice to quit or other legal proceedings, there was a very distinct intimation that if the tenants did not yield to Captain Griffith's terms, the land would be taken from them and given to another. There was in substance a threat of eviction.

Now, to turn to the lease itself. Does it contain terms unreasonable or unfair to the tenant, having regard to the Land Act of 1870? We have already decided in the case of *Ewart*, tenant; *Gray*, landlord, that the section is not confined to leases containing clauses or covenants debarring the tenant from the benefits of the Act, but comprises every lease which, taken altogether, in our opinion contains terms unreasonable or unfair to the tenant, having regard to the Act of 1870.

In this case valuable buildings had been unquestionably erected on the farm. Mrs. Kelly swears positively that these buildings were erected by her husband, who died in debt in consequence of the expense incurred in erecting them; upon that point, on which she spoke most positively, she was not cross-examined. Captain Griffith says the buildings were erected by his father; but of that he gives no evidence whatever, except that he says his father told him, which of course must be simply wiped out from our minds as forming no evidence whatever.

Mrs. Kelly is asked as to her own knowledge, as to what her husband did, and she answered, "all the improvements that are on it, he made them all, and that he expended £500 upon them." Mr. Mitchell, a practical farmer residing in the neighbourhood, who knows the lands for about thirty years, says he remembers the improvements made by Michael Kelly, the husband of Mrs. Kelly; very extensive and very good improvements. That he saw Kelly's men working at the house; that he did not know who paid for the house, but he saw Mr. Kelly getting it built. He says, besides, that he saw him improving the land itself; that he was a very improving man; that he removed walls and took out stones, and made drains, everything a good tenant could do to the land. He estimates the value of the buildings at the present time, taking into account that the tenant had the use of them, at £350; £300 for the dwelling-house, and £50 for the office. If, in fact, these improvements, which appear to have been made twenty years ago, were in reality made by the landlord, it is impossible there should not be some evidence of the fact forthcoming; we conclude that they were made by the tenant.

For the value of these improvements the tenant was entitled to be paid, in addition to compensation for disturbance, what might amount to three years' rent of the holding. The entire of the compensation for disturbance was, as the law then stood, lost and forfeited by the acceptance of the new lease, according to the law as laid down in *Holt v. Harberton* (1), and other cases. In addition, the tenant had to pay a fine of £150 on a lease for of single life, a rent of £1 12s. 6d. an Irish acre, double the former rent. In estimating this rent Mr. Palmer took into account not only the buildings, but also the fact that the tenant had the lands before at a cheap rate. MR. COMMISSIONER VERNON then said to him, "You state that you valued the land, and one item you took into consideration was, that the tenant had it for twenty-one years at a cheap rate. Would you consider that an element in valuing land as it stood, that the tenant had had it cheap for

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twenty-one years?" He answers "I would not, but I would consider it as an element that you should not be very lenient in fixing the rent." As to the amount of rent we have the evidence of Mr. Mitchell, to whom I referred above. He says distinctly that at any time £1 12s. 6d. an acre was an exorbitant rent for the land. It is true that for some time Mrs. Kelly did make something out of the land by letting in conacre. But on that subject Mr. Mitchell says from his own experience, that anyone who lets in conacre cannot make by it, because the land is so much reduced. He says he knows that Mrs. Kelly has not run out the land by a system of conacre for any length of time; that she treated the land well after the conacre people, laying it down with clover. The present value of the land he estimates as follows:—For 36A. 3R. 3P. of arable, 18s. an acre; for 3A. 2R. 4P. of marsh and swamp, 4s. 6d. per acre. We enter into this question of the rent, not that we are directly estimating the fair rent of the holding, but because it is impossible for us in this inquiry to leave the rent out of our view. It might be possible that the terms might be in other respects unfair to the tenant—that the right to his improvements might be lost, that a fine might be paid, and that these losses might be counterbalanced by the lowness of rent. But in this case we are of opinion that the rent itself is excessive, even if there were no improvements and no fine. We are unanimously of opinion that the lease is unfair to the tenant, having regard to the Act of 1870. We accordingly declare it void, as from the date of our order.

MR. COMMISSIONER VERNON concurred.

Solicitor for the Tenant: *W. Harkan.*

Solicitor for the Landlord: *J. C. Davys.*

DECEMBER 24, 1881.

JOHN BARRETT, TENANT; LORD VENTRY,
LANDLORD.

Application to enlarge time of redemption of tenancy under L. L. (Ir.) Act, 1881, sect. 13, sub-sect. 2—Intention to sell necessary—Time enlarged pending the fixing of a judicial rent—Jurisdiction of Court to define “first occasion on which it sits after the passing of this Act”—L. L. (Ir.) Act, 1881, sect. 60.

Where a tenant has been, under an ejectment decree for non-payment of rent, evicted prior to the passing of the L. L. (Ir.) Act, 1881, the tenant can move the Court to enlarge his time of sale under the L. L. (Ir.) Act, sect. 13, sub-sect. 2, although the six months allowed for redemption by the Landlord and Tenant Act (1870), sect. 70, be expired since the passing of the L. L. (Ir.) Act, 1881, provided he make the application during the time which the Court has defined to be “the first occasion on which it sits after the passing of the L. L. (Ir.) Act, 1881.”—Effect of this application within that defined time is to put him in same position as if he applied on August 22, 1881.

Sect. 60 L. L. (Ir.) Act, 1881; sect. 13, sub-sect. 2, empowers the Court only to extend time where sale delayed, not for any other cause. There must be intention to sell—Court has no power to extend time for redemption only.

THE facts of this case are fully given in MR. JUSTICE O’HAGAN’s judgment.

Mr. Roche, for the tenant:—

As to the jurisdiction of the Court to define “first occasion,” L. L. (Ir.) Act, 1881, sect. 60. Under sect. 50, sub-sect. 1, clauses (b) and (o), together with sect. 43, the Court has ample power to make any rules necessary for carrying into effect the purposes of the Act. “Occasion” must be equivalent to “sitting” in the Judicature Act. If a narrower meaning was intended, the word used would be “day” not “occasion.” Sect. 43 empowers Court to appoint its sittings. It would have been a physical impossibility for all the tenants to apply on the first day. With regard to the contention that no notice to sell had been served, it is not required by the Act. The sale, in sect. 13,

must mean sale of the new judicial rent, which has not yet been fixed. The right conferred by sect. 13 must be referred back to sect. 1, which enacts the tenant "may" sell. In sect. 13, sub-sect. 2, the words "or for any other reasonable cause" must mean some cause different from delay of sale, otherwise the word "for" would not be used, but the word "by," as in the preceding line. In sect. 13, sub-sect. 2, the words "or in case of ejectment for non-payment of rent redeem the tenancy" exclude the idea of sale; "or redeem" must mean redeem for himself, otherwise it would be "and redeem."

Holmes, Q. C. (with him *Morphy*), for the landlord:—

Barrett's notice or affidavit did not open up any other reasonable cause save delay, pending application to fix a judicial rent. Sect. 1 gives right of sale out of Court. "For" in sect. 13, sub-sect. 2, must mean "by;" any other construction would be forced. Sect. 50, sub-sect. 1, clause (b), only refers to the course of proceeding. Clause (o) gives no power to define what Parliament meant by "occasion," in sect. 60. "Occasion" must be construed without reference to the orders of the Court enlarging the time; the reasonable construction of the word must be taken. First time is equivalent to first occasion. First occasion does not necessarily mean first day. If 40,000 tenants were in a position to apply on the first day the Court sat, any holding over of these cases would be within the first occasion. In this case the tenant had not clothed the Court with jurisdiction by serving notice before the first day of sitting. It would be *ultra vires* of the Court to put a gloss on the language of the Act.

As to the right of redemption conferred by sect. 13, sub-sect. 2, it is clearly limited to where there is an intention to sell. The words at the commencement of sect. 13, sub-sect. 2, govern the whole sub-section.

Morphy, for the landlord.—Sect. 13, sub-sect. 1, gives right to fix a fair rent, not as a substantive right, but as ancillary to the right of sale.

O'HAGAN, J. :—

In the case in which John Barrett is tenant, and Lord Ventry is landlord, a judgment in ejectment for non-payment of rent had been obtained by the landlord, which was executed and possession taken on the 6th May, 1881, the tenant being left in possession pending redemption. On the 10th November, 1881, a notice of motion was served by the tenant, of an application to this Court for an order to extend the time during which the tenant might exercise his power of sale, or redeem the tenancy, on the ground that the sale of the tenancy was delayed pending an application to have a judicial rent fixed. This notice by mistake appears to bear date the 19th November. Its true date is the 9th November. An originating notice to have a fair rent fixed for his holding was served on the 10th November. The motion was originally made before us on the 12th November. The hearing of it was then adjourned, owing to pressure of other business, and stood adjourned from time to time for the convenience of the parties and of counsel, and was at last fully argued on the 2nd of December. The question is, whether we have jurisdiction to make any order on the motion.

The 70th section of the Landlord and Tenant Act of 1860, which in this respect is but a re-enactment of the provisions of an earlier statute, gives six months after the execution of the *habere* for the tenant to redeem in the manner provided by the statute, in default of which redemption he is debarred from all relief at law or in equity. Therefore, on the 6th of November, 1881, the tenant's right of redemption was gone, unless we had the power of extending the time for redemption under the Act of 1881. It was the tenant's contention that we had in fact this power, and he called upon us to exercise it in his favour. His counsel urged, first, that under the 13th section we had the power for any reasonable cause to extend the period during which the tenant might, in case of ejectment for non-payment of rent, redeem the tenancy, irrespective of intention to sell. Secondly, that even if our power did not extend so far, but only enabled us to extend the time for

redeeming the tenancy, when the sale of the tenancy is delayed by reason of any application being made to the Court, or for any other reasonable cause, yet that in this case the sale of the tenancy was in fact delayed by reason of the application to fix a fair rent; and that being so delayed, the tenant was entitled to have the time for redemption extended in order to a sale being had. And, in answer to the objection on the part of the landlord, that even if the tenant's proposition could in any case be tenable, yet in this case the tenant came into Court altogether too late, his time for redemption having expired on the 6th of November, and no step of any kind having been taken by him until the 9th of November, the tenant replied that the time was saved for him by force of the 60th section of the Act; that he applied to the Court on the first occasion on which it sat after the passing of the Act, and that, therefore, his application was to be taken as if it had been made on the 22nd of August, the day on which the Act received the Royal assent. These were the tenant's legal propositions. On the other hand the landlord asserted: first, that no power to extend the time for redemption is conferred upon this Court save as ancillary to the extension of time for sale of the tenancy. Secondly, that the time for sale of the tenancy being by the preceding part of the section confined to the period of six months from the execution of the writ, or decree for possession in an ejectment for non-payment of rent, some step must have been taken within that period of six months to effect a sale; and it must be shown that the sale thus initiated within the prescribed period was in fact delayed by reason of some application having been made to the Court, or for some other reasonable cause; and that, if no such step were taken within that period, the jurisdiction of this Court absolutely failed: and with regard to the effect of the 60th section, he contended that the time when the application was made to the Court, namely, the 10th of November, could not legally be held to have been made on the first occasion of the sitting of the Court. The issues in law thus knit were argued on both sides with great ability and ingenuity, and we now proceed to consider them *seriatim*.

First—Has this Court a power under the 13th sect. to extend the time for redemption irrespective of delay of sale? Our *prima facie* view, to which I gave expression very early in the sitting of the Court, was in the negative of this proposition; and to this view, after very full consideration, we adhere. But I am bound to say that I was considerably impressed, if not shaken, by the argument on this point addressed to us on the part of the tenant, and I can well conceive that a different interpretation might commend itself to another mind. The 13th sect. is as follows:—[HIS LORDSHIP read the section.] Counsel for the tenant urged that the words, “for any other reasonable cause” applied not to the delay of the sale, but to the grounds of the action of the Court—that in fact it was to be read as if it ran thus: “The Court may, when a sale is delayed by reason of an application to the Court, or may for any other reasonable cause, extend the time for sale, or in case of an ejectment for non-payment of rent extend the time to redeem the tenancy.” He urged that the word “for” would never have been introduced, and the sense beginning with the words “by reason of” would have been simply carried on without a new preposition if nothing but the reason of delay of sale was contemplated. But he chiefly relied on the alternative word “or” at the end of the clause. The power he argued was a disjunctive one. The power to extend the sale was given, he said, in any case of eviction, whether in case of ejectment for overholding or in case of non-payment of rent, but in the latter case a separate power in the disjunctive is conferred, namely, an independent power to extend the time for redemption. The force of this latter argument I do not disguise from myself; and I feel that in order to give the clause a meaning which confines it to delay of sale, we must read the word “or” as if it meant “and”—a construction only open to us if we are convinced that no other interpretation will make the clause consistent and coherent with itself: yet to that conclusion, in my opinion, we are compelled. The sub-section opens with the words “when the sale of any tenancy is delayed;” and as the sub-section consists of but one sentence, we must hold that these words govern the entire of it, and that

all the powers conferred upon the Court are dependent on that circumstance. The 1st sub-section is conversant altogether with the power of sale, and the 2nd sub-section is as it were engrafted upon it, showing the cases in which the power of sale may be extended; and as a necessary ancillary to that extension, the times for redeeming the tenancy, where the ejectment was for non-payment of rent, extended also. The startling consequences of the tenant's proposition must also be considered. For it must amount to this, that in every case of ejectment for non-payment of rent, whether in the Civil Bill Court or the Supreme Court of Judicature, this Court, wholly irrespective of any proceedings being pending here, would have power, for what it might deem reasonable cause, to extend the time for redemption. Against such a construction the 3rd sub-section, giving power, not to this Court, but to the Court where the proceedings are pending, to suspend the proceedings in cases where an application is made here to fix a judicial rent, appears to me to afford an argument of enormous weight. Upon this point we feel ourselves forced to decide with the landlord.

The next point is whether the tenant has made his application to extend the time for sale in sufficient time. Apart from the 60th sect. he plainly has not. The 60th sect. is as follows—[HIS LORDSHIP read the section.] Upon this section the tenant contends that his application was in fact made to the Court on the first occasion on which it sat, and, that being so made, the Court had all the power to give him relief which it would have had if it had sat on the 22nd August, the day of the passing of the Act. The landlord, on the other hand, asserts that the application was not made on the first occasion of the sitting of the Court; and that even if it was, the lapse of the six months without a step being taken by the tenant towards effecting a sale was fatal to him. These questions we have now to consider: on the 19th of October we made and promulgated the following Order—[HIS LORDSHIP read the Order of the 19th October, 1881, fixing the period of the first sitting of the Court for the period up to and including Saturday, the 29th October.] And on the 27th of October we made the following further Order—[HIS LORDSHIP read the

further Order, extending the time of the first sitting to Saturday the 12th November.]

These Orders, it was contended, were *ultra vires* and void—that we had no power given to us to fix any particular period as this first occasion on which the Court sat. Mr. Weir insisted that first occasion must mean the first day. Mr. Holmes did not go so far. He said it meant the first time. As I understood him, he did not deny the power of the Court to adjourn *de die in diem* until all the applications were disposed of; but, he contended that the parties should have taken some step towards making the application on or before the 20th of October, the first day of the sitting, although he admitted that if, from the pressure of the number of applications, the Court could not dispose of them all at once, it might sit daily till they were finished. So I understood his argument.

Now I have to state that, as regards our sittings, the Act of Parliament leaves us entirely free. The sittings of the Court are not defined by statute, as the sittings of the Supreme Court or the sittings of the Courts of Quarter Sessions, within certain limits, are. The power of making Rules conferred on us is of the very widest character. It embraces any matter or thing in respect to which it may seem to the Land Commission expedient to make Rules for carrying the Act into effect. Have we not, therefore, power to define what time the first session of the Court shall embrace? And if, in view of what turned out to be the case, namely, the very great number of applications which would be made on the first occasion of our sitting, we determined that that sitting should be of a certain lengthened period, how can it be said that such an Order is *ultra vires*? It is to be observed that the word “Court” does not mean our Court alone. It embraces, and indeed, according to the Act, primarily means, the Civil Bill Court. I asked one of the learned counsel who argued this case whether he contended that an application to the Civil Bill Court under the 60th section must be made on the first day of its sitting after the passing of the Act? He answered that he would so contend. I can only say that such a contention appears to us wholly untenable, and a virtual abro-

gation of the 60th section. The first occasion of the sittings of the Civil Bill Court means, in our opinion, the first session of that Court after the passing of the Act. We consider that the application might be made on any day of such first session of the Civil Bill Court, and that it might be made on any day of the sitting which we constituted our first session.

But even so, Mr. Holmes further contends that our power was gone, inasmuch as no step towards a sale had been taken within the six months. The consideration of the 60th section, in our opinion, displaces that argument. The tenant came in, as we hold, on the first occasion on which the Court sat, and applied, in pursuance of an originating notice served by him, to have a fair rent fixed for his tenancy. That application he had a right to make under the combined effect of the 13th and 60th sections. We recorded that application as made by him on the first occasion of the sitting of the Court, and adjourned its further hearing until it should be heard by a Sub-Commission duly delegated by us to deal with it. He further applied to extend the time for sale of his tenancy, inasmuch as the sale would be delayed pending the application to fix a fair rent. Now, if we were sitting on the 22nd August, would not these applications have been perfectly in time under the 13th section? And does not the 60th section oblige us to deal with them as if we were sitting on that day? See what Mr. Holmes' contention would lead to. The sale must be a sale pursuant to the Act, and made in the prescribed manner. Our Rules, though we used the utmost despatch, necessarily took some time to prepare, and were not in fact promulgated until the 1st of October. Until that time, therefore, the prescribed manner did not exist. Is it to be contended that every tenant whose time for redemption and sale had expired before that date was debarred from his right to sell under the statute, though he could not know what the mode of sale under the statute was? It was precisely in view of possibilities of this kind that, in our opinion, the 60th section was passed, and we would contemplate with dismay a result which would be as nearly as possible a repeal of it. The motion thus made, on the first occasion of the sitting of the Court, stood

adjourned for the convenience of all parties. We now make our order upon it, extending the time for sale of the tenancy until the 20th of May; and we extend the time for redemption until the same period. This order will, under the 60th section, have the same effect as if made on the 22nd of August, 1881; and the order to fix a fair rent will operate as if made on the same day.

MR. COMMISSIONER LITTON :—

The first question for the Court to consider in this case is, whether it has power to extend the time to enable a tenant to redeem his tenancy, irrespective of a proceeding by him to sell. The second, whether, through the combined operation of the 13th and 60th sections, an application made after the six months have actually expired, if made between the 20th October and the 12th November inclusive—the period limited as the first occasion on which the Court shall sit—is made in sufficient time. Regarding the dates in the present case, the application would be late if the above question is answered in the negative. Now, as regards the jurisdiction of the Court to extend the time of redemption, irrespective of a sale, I am of opinion that the time can only be extended as ancillary to a sale by the evicted tenant of his tenancy. The Act of 1881 confers on the tenant evicted for non-payment the right to sell his tenancy within the time limited, whether the eviction takes place before or after the passing of the Act. This is a general provision applicable to all cases. The section then proceeds to confer a further right—but limited to cases where the eviction has taken place before the Act—namely, it enables the tenant in such a case (but still within the six months) to apply to the Court to have a fair rent fixed. This provision is confined to evictions before the Act, for this reason, as it appears to me, that no opportunity of fixing a fair rent existed for those already evicted, who were out of occupation, and therefore the special provision referred to was inserted. The position then under the 1st sub-section is this: the tenant evicted for non-payment of rent before the Act may sell his tenancy within the six

months, and likewise apply to have the fair rent fixed. It is to be observed that the tenant's right of redemption is left precisely in the same position as it stood before—unaffected and unaltered. What the sub-section does is to give a right to sell the tenancy. Now, the right of sale conferred by the 1st section of the Act is a right which may be exercised without application to the Court. The necessity of an application to the Court only exists where a controversy arises between the landlord and the tenant in relation to the sale, and *may* arise at different stages of the proceeding. Again, even without any such controversy as I refer to, the tenant evicted before the 22nd August might desire to have the rent fixed so as to enable him to sell, as he might imagine, on more favourable terms; and thus a reference to the Court would become necessary. Either proceeding must occupy time beyond the control of the tenant, and it would have been idle to confer on the evicted tenant the right of sale if the limit of six months was absolute. The tenant would have been completely in the power of the landlord, who, by objecting to the purchaser, or by some other step, could render it impossible for the tenant to complete the sale within the time; or he might perhaps compel the tenant to forego some right conferred on him by the statute rather than allow the six months to elapse, and with it lose his right of sale altogether. To prevent this result some such provision as is contained in the 2nd sub-section was absolutely necessary, and it was, I cannot doubt, introduced simply with the object of effectuating what alone was aimed at in the 1st sub-sect.—namely, the sale of the tenancy. It provides that when the sale is delayed by reason of an application to the Court, or any other reasonable cause, the Court should have power to relax the limit of time specified in the 1st sub-section; but, as I apprehend, clearly for the purpose of that which was indicated in the 1st sub-section—a sale. The application to the Court has reference, not alone to an application to fix the rent, but to any dispute which required the intervention of the Court in the course of sale under sect. 1 of the Act; and further, to any reasonable cause which, without default of the tenant, might by reason of lapse of time

defeat his right. In such case the Court is given power to extend the time. The sub-section adds: "or the time during which the tenant may redeem his holding." It has been argued that this confers a right to extend the time for redemption, for the purpose of redemption only. In my opinion, this is not the true construction of the sub-section. Sub-section 2 covers the two branches of the 1st sub-section, which deals with the respective classes of ejectments therein mentioned. The language, therefore, of sub-section 2 is disjunctive; but the single purpose of the 1st sub-section is that of sale alone. It does not affect to alter the time for redemption, but leaves that as it found it; and it appears to me the power to extend the time within which the tenant might redeem was for the purpose of effectuating the sale, and for that purpose alone. I have now to consider the 60th section, as it affects the present case. I think the aim and object of that section is plain. The Act was passed on the 22nd August. It was thought reasonable, and no one can doubt that it was reasonable, that during the period required to enable the Commission to prepare its Rules and make provision for its sittings, rights should not be lost by reason of events which the party could not control. The 60th section provided, therefore, that any application made to the Court on the first occasion of the sitting should be regarded as made on the 22nd August, and that the person should be in the same position and have the same rights in respect of his tenancy as he would have been in and would have had if the application had been made on the day on which the Act came into force. The first day the Court sat was the 20th October. If the "occasion" means the first day, the present application is late. It seems to me impossible to contend that the first occasion should be held to be the first day of the first occasion. If the Civil Bill Court was the Court to which the tenant applied, surely an application made at any time during the October Sessions would be sufficient. If the first "day" had been intended, nothing would have been more easy than to have said so; and the fact that "occasion" and not "day" has been used satisfies me that it was not intended to limit the time within which the ap-

plication should be made to the first day of the sitting. If this be so, the Court, of necessity, must have the power to determine how many days the sitting shall last. It is said that the Court, in defining "occasion," has assumed legislative functions. I do not think so. We have but interpreted the phrase as we would be bound to do any other phrase not defined, and have simply appointed days for the commencement and termination of the sitting, which becomes a necessity the moment you conclude that the "first occasion" cannot be read the first day. We have then an application to extend the time with a view to sell, and an application to fix a fair rent, in effect made on the 22nd August. The tenant on that day had over two months to serve notice of intention to sell, independently of any order the Court might make on his application. I apprehend it would have been quite enough, upon the application being made on the 22nd August, for the tenant to have stated that he intended to sell, and to have given an undertaking to serve the notice within a limited time, and that it was not necessary he should at the time have already served the notice as a condition precedent. We may make the order now, which we would have then made if we arrived at the conclusion on the 22nd August that a sale could not be effected within the prescribed period, having regard to the fact that a fair rent had to be fixed, and that such could not be done within the six months. By no other construction could a tenant evicted on the 23rd February obtain relief, although such a tenant had, on the 22nd August, well defined rights confirmed by the statute. I do not entertain any doubt that the judgment of the Court is right.

Solicitor for the Landlord: *Stephen Huggard.*

Solicitor for the Tenant: *J. P. Broderick.*

JANUARY 20, 1882.

DERHAM *v.* HAMILTON.

Application to have originating notice to fix a fair rent set aside—Several distinct holdings included in one originating notice—Originating notice set aside.

Hamilton, for the landlord, moved to set aside the tenant's originating notice to have a fair rent fixed, as embarrassing and irregular, as including several distinct holdings. The originating notice had been served on October 27th. The tenant held lands as yearly tenant to Mr. Hamilton, amounting in the aggregate to 141 acres, in which there were nine separate portions. One receipt was given for the entire rent, but the various holdings were set out. Great confusion would be caused if the originating notice were not set aside, and if the lands came in one group before the Sub-Commission.

John Roche, for the tenant, opposed the motion.—The originating notice was served in October, and no effort to set it aside had been made until this month. The originating notice could not be a cause of embarrassment.

O'HAGAN, J.:—

Great embarrassment would be caused to tenant, landlord, and the Sub-Commissioners, if the present originating notice went before the Sub-Commissioners. The Court would order that the landlord serve on the tenant, within a week, notice of his several holdings as tenant from year to year, giving the names of the holdings and the rents; the tenant to be at liberty, within a week from receipt of such notice from landlord, to serve such originating notice as he might be advised, service of which should be accepted by the landlord's solicitor.

Solicitor for the Landlord : *W. G. P. Hamilton.*

Solicitor for the Tenant : *William Smyth.*

JANUARY 23, 1882.

BINGHAM *v.* MACRORY (1)

Application on the part of the landlord to have an originating notice to have a fair rent fixed set aside, on the ground that the tenant held under an agreement for a lease for an unexpired term of twenty-one years.

It appeared that the landlord, Mr. Macrory, previous to the year 1874, had bought the property in question. He had a re-valuation made in that year, and raised the rent. The tenants refused to pay the increase, whereupon the landlord served notices to quit, and brought ejectment proceedings. The tenants filed land claims, and the cases came before the Chairman of Londonderry County, sitting at Limavady. By consent, the Chairman adjourned the cases, and made an order to refer the cases to Messrs. Brassington & Gale to value the lands and settle the rent to be paid; and on the face of the order appeared a statement that the custom of the estate was not to re-value the lands more than once in twenty-one years, and that the valuers should have regard to this fact in fixing the rent. The rent was settled by Messrs. Brassington & Gale; but no final order was ever made in the cases, although the new rents as fixed by Messrs. Brassington & Gale were regularly paid.

Fitz Gibbon, Q. C., for the landlord, contended that the order of the Chairman referring the matter to Messrs. Brassington & Gale was equivalent to an agreement for a lease for twenty-one years. He referred to *Archbold v. Howth* (2).

Todd, for the tenant, *contra*, contended that there was no such agreement. The landlord, if he had wished to determine the tenancy within twenty-one years, would not have been precluded from so doing by the terms of the Chairman's order.

(1) Before COMMISSIONERS LITTON, Q. C., and VERNON.

(2) 1 Ir. R. C. L. 608, 621.

As a matter of fact, when the re-valuation was made in 1874, only twelve years had elapsed since the last valuation, and the landlord at that time exercised his right of ejectment. He referred to the cases of *Powerscourt v. Mitchell* (1); *Hillock v. Cope* (2).

MR. COMMISSIONER LITTON, Q. C. :—

This motion must be dismissed with costs. The arrangement come to before the Chairman amounted to an agreement that an incident of the custom of the estate should be brought into play in favour of the tenants when settling the future rent. The custom was not to re-value oftener than once in twenty-one years; and as there were nine years to run since last re-valuation, this was to be taken into account in favour of the tenants. But the arrangement was not to dispossess the tenant for twenty-one years, but it was an arrangement not to re-value the lands for twenty-one years. There was no creation of an estate, but a settlement of the rent. *Powerscourt v. Mitchell* (1) rules this case. There was no intention to create a new tenancy.

MR. COMMISSIONER VERNON concurred.

Fitz Gibbon, Q. C., applied that no final order should be made on the motion until the landlord might consider if he would institute a suit for specific performance in a Court of Equity.

THE COURT allowed the motion to stand for one month; the landlord within that time to take such steps for enforcing specific performance as he might be advised.

Solicitor for the Landlord: *R. A. Macrory*.

Solicitor for the Tenant: *R. H. Todd*.

[SITTINGS IN BELFAST].

DAVID ADAMS *v.* JANE DUNSEATH (1).

Appeal from Court of the Sub-Commissioners—Application by tenant to have a fair rent fixed—Sect. 8, sub-sect. 9, of L. L. (Ir.) Act, 1881—Improvements made by the tenant or his predecessors in title—Sects. 4 and 6 of the L. & T. Act, 1870.

A took a lease of the lands of *X*, of which he was then in possession, for thirty years from the 1st November, 1845. The lease was dated the 2nd March 1846, and, on the faith of a promise of the lease, *A* built a dwelling-house on the lands. *A* assigned his interest in the lease to *B* in October, 1846, and *B*, during the currency of the lease, constructed buildings, reclaimed waste lands, and made other improvements. *B*, at his death, left the interest in the unexpired lease to his son *C*; and *C*, during the currency of the lease, made further improvements. On the expiration of the lease in 1875 the lands were re-valued, and *C* remained in possession as tenant from year to year thereof at an increased rent :—

Held (1)—MR. COMMISSIONER VERNON *diss.*—that the landlord was not entitled to rent in respect of improvements made previous to the expiration of the lease, although the nature of the tenancy had been changed; (2) that a formal surrender of the old tenancy and the acceptance of a new one does not, under the L. L. (Ir.) Act, 1881, constitute a break in the title, but the title must in reality and substance be traced from the tenant who made the improvements to the present tenant; (3) that no deduction can be made from the value of the tenant's interest in his improvements under sect. 4, sub-sect. 1, L. & T. (Ir.) Act, 1870, having regard to sect. 8, sub-sect. 9, L. L. (Ir.) Act, 1881; (4) that mere enjoyment of possession and of the advantages of his improvements by the tenant under a lease is not such compensation as is meant by sect. 8, sub-sect. 9, L. L. (Ir.) Act, 1881; (5) that unless the Sub-Commission have erred in principle, or have seriously erred in amount in fixing a fair rent, the Commission will not vary their order; (6) that costs, in the absence of special circumstances, should not be given to either landlord or tenant by the Sub-Commission when fixing a fair rent, but the costs of the appeal should follow the result.

Per MR. COMMISSIONER LITTON.—In estimating the fair rent payable by a present tenant, the difference between the commercial and the competitive rent should be assumed to belong to the tenant. The commercial value is the rent a solvent tenant, of ordinary capital and skill, could afford

to pay, one year with another, for the holding, excluding any value arising from the hunger for land, desire of possession, or peculiar circumstances. The amount by which the value of the letting has been increased by the tenant's improvements, or those of his predecessors in title, should further be deducted from the rent. The personal qualifications of the tenant, his manner of life, and number of family, is in nowise a matter for consideration in fixing a fair rent.

THIS was an appeal by both the landlord and tenant from the decision of the Sub-Commissioners fixing a fair rent.

MR. JUSTICE O'HAGAN :—

This case, the first appeal which has been heard before us, is one of the greatest importance. The holding is not an extensive one, nor does the question of value of itself present much difficulty ; but it so happens that several of the most serious and debated questions of law which have been mooted on the construction of the Land Act of 1881 require decision in this case. I regard this as a fortunate circumstance, inasmuch as an opportunity will be given, not by our decision alone, but, as we trust, by that of the Court of Appeal, of setting some of these questions at rest, and of determining the principles in regard to them upon which our Courts must in future act. The facts of the case lie within a short compass. The holding consists of 42 A. 1 R. 5 P., statute measure, which may be divided into two parts, one containing 20 A. 2 R. 21 P., Irish, or a little more than 33 A. statute, formerly held under a lease which expired in 1875, and of about 9 statute acres of bog, taken from time to time by the tenant since the expiration of the lease. In the year 1842 the 20 acres Irish were in the possession of a man named James M'Kee. The landlord was the Earl of Mountcashel. In that year Lord Mountcashel thought it right to have the holdings of the tenants valued, with the view of granting leases to them. It has chanced that one of the gentlemen engaged in the valuation, Mr. Raphael, survives, and has been a witness in the present case. Mr. Raphael has given us the details of the then valuation, field by field, amounting in the aggregate to £26 11s. 6d. No lease was executed for more than three

years afterwards, and in the meantime M'Kee built a good house on the holding, partly, as it appears, with the materials of an older and inferior house which he took down. Although the new house was built two years before the date of the lease, yet it is admitted that the lease was spoken of and contemplated. The lease itself bears date the 2nd of March, 1846. It is from the Earl of Mountcashel to James M'Kee, for the term of thirty years from the 1st November, 1845, at the rent of £26 11s. 6d. It contains the usual covenants to keep the premises in repair, and to render them up at the end of the term. It contains a covenant against alienation, but no other special clause. In the October of the same year, M'Kee sold and conveyed the holding comprised in the lease to John Adams, father of David Adams the present tenant, for a sum of £240. Adams the father died thirteen years ago, and the land came through him to his son. Improvements were made both in the lifetime of the father, and after his death by the present tenant. These improvements consisted of additions to the buildings and of reclamation of waste lands, and the making of a farm road. The lease expired in November, 1875. Other leases on the estate expired at the same time, and a re-valuation took place. Mr. Raphael, who had taken part in the valuation of 1842, was once more the valuer. He valued the lands which had been in the lease at £31 17s. 6d., a valuation which, as he stated, excluded all improvements whatsoever, so as to render it a rent which the tenant ought to pay irrespective of the improvements executed upon the holding. Adams had from time to time taken portions of bog at rents amounting in the aggregate to £4 10s., so that his rent altogether became £36 7s. 6d., at which amount it stood until the decision of the Sub-Commission from which this is an appeal. The Sub-Commission fixed the judicial rent at £30 15s.; and we have now to decide whether this judicial rent ought to any, and if so to what, extent be varied. But, before approaching the question of the fair rent, there arises the discussion of the principles upon which the rent is to be estimated; and first amongst these, the controversy how far improvements effected by the tenant are to be excluded in estimating such rent. Mr.

Holmes submitted to us certain legal propositions on the part of the landlord in this and other cases of *Mrs. Dunseath*, which, as applied to the present case, are as follow:—

(1). That the landlord is entitled to rent in respect of all improvements made previous to the expiration of the lease in 1875, inasmuch as such improvements were not made by the tenant or his predecessors in title.

(2). If the Court declined to accede to his first requisition, that the landlord is entitled to rent in respect of all improvements made during the currency of the lease, except those made by the present tenant himself, inasmuch as his predecessors in occupancy were not his predecessors in title.

(3). If the Court declined to accede to requisitions 1 and 2, then (*a*), that the landlord was entitled to rent in respect of all improvements made prior to the making of the lease of 1846; and (*b*), that the landlord was entitled to some rent in respect of improvements made during the currency of the lease, on the ground that under the first clause of section 4 of the Act of 1870, some deduction must be made in ascertaining the tenant's interest in such improvements from the value thereof; and upon the further ground that, by holding under lease he has been, if not altogether, to some extent, compensated for his improvements. I now proceed to consider these propositions of law.

Mr. Holmes's first requisition amounts to a demand on the part of the landlord of rent in respect of all improvements made prior to the expiration of the lease of 1845, and the legal ground is that these improvements were not made by the tenant or his predecessors in title. But it was proved in the case, and could not be contested, that some of the improvements were made by David Adams himself, the present tenant. The words of the 9th sub-sect. of sect. 8 of the Act of 1881 are, that "no rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by the tenant, or his predecessors in title." Is it to be seriously argued that David Adams is to be charged with rent in respect of improvements made by himself while in occupation of the land as tenant, because his tenancy under the lease has expired, and he is now

in possession under a tenancy from year to year arising on the termination of the lease? In the course of the argument I called Mr. Holmes's attention to the case of *Murphy v. Mahony* (1), decided by Mr. Justice Lawson. That eminent Judge held that, under the Act of 1870, changes in the nature of the tenancy did not affect the right of the tenant who had made them to claim for improvements. That decision is an express authority on the construction of similar words in the Act of 1881.

I pass now to the second of Mr. Holmes's propositions, which is of a more serious complexion. He calls on us to hold that the landlord is entitled to rent in respect of all improvements made during the currency of the lease, except those made by the present tenant himself, upon the ground that his predecessors in occupancy were not his predecessors in title. To sustain this proposition he chiefly relied on the well-known case of *Holt v. Lord Harborton* (2). That was a case arising under the 6th section of the Act of 1870, which provides that where either a landlord or a tenant is desirous of preserving evidence of improvements made by himself or his predecessor in title, he may register those improvements in the prescribed manner. John Holt had been tenant from year to year to Lord Harborton, of 364 acres of land, and in the year 1842 he built a substantial house upon the lands, at a considerable outlay. In the year 1844, Lord Harborton granted him a lease, not only of those lands, but of 91 acres in addition, of which Holt had not previously been in possession, and gave him a lease of the entire at a less rent than had been previously paid for the portion he had held; and it was admitted that this lease was so given in consideration of the tenant's outlay in building the house. Holt, the lessee, having died, his son, who became entitled to the lease, claimed to register the house as an improvement against the landlord. It was held by the Court of Land Appeal, consisting of eleven Judges, that he could not do so. It is a case of the very highest authority, to which every Court in

(1) 14 Ir. L. T. R. 87.

(2) R. & L. A. 82.

this country must explicitly bow ; but I am bound to say it seems to me not to have decided the abstract principle contended for. Lord O'Hagan, the then Lord Chancellor, said that all former title to the lands and the improvements upon them had been surrendered and done away with by the acceptance of the lease, and there was no other title to which the son could be deemed a successor but the title under it. Unquestionably, under the circumstances of that case, all former title had been surrendered and done away with, it being taken as assumed that the new lease was granted in consideration of the circumstance of the dwelling-house having been erected. Chief Baron Pigot, of whose high legal attainments it is hardly necessary for me to speak, distinctly stated that he based his judgment upon the transactions which occurred when the new lease was granted, and he expressly guarded himself against being supposed to take any general view which would limit the construction of the Act. His words are these :—" I do not consider myself at liberty to speculate on the intentions of the legislature. I am to take what the legislature has said, when the Act describes the persons by whom the improvements must be made. The statute treats the person claiming as a person who is to have compensation for all improvements upon his holding, made by him or his predecessors in title. Are we at liberty to add to these words the words following, that is to say, 'at a time when he or they held the premises on which the improvements were made, and under the same title under which he holds them when the claim is made? I do not think it necessary to consider and decide that question. I do not consider myself in the present case bound to determine that the statute is to be read as if those or equivalent words had been inserted by the legislature; which has omitted them in both these sections."

There are two other cases to be considered, one prior and the other subsequent to that case. The former is the case of *Darragh v. Murdock* (1). It was a claim for compensation for improvements, under the Act of 1870. The father and grand-

(1) 5 Ir. L. T. R. 38, 67.

father of Darragh, the claimant, had been in occupation of the farm for nearly one hundred years. Darragh's father held it by a lease for his own life, which expired in June, 1866. The claimant Darragh, the son, on his father's death, entered into possession of the farm, and remained in such possession until November, 1867. In that month an agreement was entered into between Mr. Murdock, on the one hand, and Darragh, and two sureties for him named Kirk and Sloane on the other, by which Murdock agreed to let to the three conjointly the farm for a year certain, from the 1st November, 1867, at the rent of £22 16s. 9d., an increase upon the former rent, they agreeing to give up possession at the end of the year, and to pay for any depreciation of the lands. It was also provided that Murdock might at any time enter upon the farm and lay down materials for building. In the month of November, 1868, a similar agreement was made for another year. In November, 1869, a like agreement was also made. In May, 1870, a notice to quit was served, which expired in the November of that year, when an ejectment was brought. Darragh thereupon claimed under the Act of 1870, in respect of improvements made by his father upon the holding. The learned Chairman of the county of Antrim held that he was not entitled to compensation in respect of these improvements, on the ground that his father was not his predecessor in title. This decision was upheld by Mr. Justice Fitzgerald on appeal. The latter expressed himself as follows, "upon the question of law in this case, I entertain no doubt. The claimant is not such a successor as is recognised by the Act. I should be slow to hold that continuity of possession and title would be broken by a mere increase of rent; but this case is wholly different. The claimant's predecessor held under a lease which expired with himself. The claimant then, having acquired a tenancy from year to year, entered into a totally new arrangement with the landlord, under which the term and the rent were altered. It is clear that the landlord wanted the farm for building ground, and took it up for this purpose. It was expressly provided by the agreement made in 1867 that the claimant was only to be tenant for a year, and that at the end of the year

possession was to be absolutely given up, and the landlord to resume possession as he had a right to do. To talk of continuity of possession is quite out of the question, as in 1867 a new title in every particular was created." I do not of course venture to question the authority of a case so decided; but what is the case? The lease during which the improvements had been executed expired with the life of the lessee who made them, and at no moment of time did the claimant represent or succeed to the title of his father. As the law then stood, the lands, with all the improvements upon them, became absolutely vested in the landlord, and the claimant made three successive agreements for a taking the lands for a time certain.

I now turn to the case which followed *Holt v. Harberton* (1). It is the case of *Milliken v. Hardy* (2), also heard before the Chairman of the County of Antrim. The case was this: On the 21st April, 1832, Joseph Wallace had executed to William Terlford a lease of the holding, for one life or thirty-one years, at the rent of £27 6s. There was a covenant to expend £100 in building a dwelling-house. The estate of Wallace, the lessee, devolved first upon a gentleman named Hill Hamilton, and then upon Mr. Hardy, the Respondent. The lessee's interest became vested by assignment in William Walker; and the then landlord, Mr. Hill Hamilton, having obtained judgment against Walker, and issued an execution on foot of this judgment, the lessee's interest in the premises was in 1854 sold by the sheriff to George Milliken, the claimant's testator. In the month of May, 1854, George Milliken took from Mr. Hill a new lease for the term of twelve years from the 1st November, 1862, at an increased rent of £30 12s. 1d., that increased rent to commence immediately, that is to say, from the 1st May, 1854. George Milliken afterwards died, having bequeathed his farm to Milliken the claimant. On the termination of the lease in November, 1874, an ejectment was brought, and thereupon a land claim was filed by the tenant, claiming in respect of improvements executed by Terlford and his assignees prior to

(1) R. & L. A. 82.

(2) 9 Ir. L. T. R. 79; Donnell's Rep. 473 (ed.) 1876.

the lease of 1854. The learned Chairman, holding that the lease of 1854 operated as a surrender by operation of law of any existing lease, thought the case was governed by the cases of *Holt v. Harberton* (1) and *Darragh v. Murdock* (2). His decision was upheld on appeal by the Chief Justice of the Common Pleas. "Morris, C. J., held, on the authority of *Holt v. Harberton*, that the claimant was not entitled to compensation for improvements executed prior to the new lease in 1854. The lessee of the 1832 lease was not the predecessor in title of the present claimant. Predecessor in title does not mean predecessor under another title, but predecessor in the same title."

Now in this case also the claimant had never for a moment of time been possessed of the estate which existed in the lands at the time the improvements claimed for were made. It was assumed throughout the case that the lease of 1832 was surrendered and gone by the acceptance of the lease of 1854, and the claimant never had any title save to the latter lease alone. But does it follow from any of these decisions that if a father, the lessee under a lease, makes valuable improvements and then dies, bequeathing the lease to his son, and if the son, on the termination of the lease, instead of at once surrendering the possession and claiming compensation for the improvements, continues on as tenant under the implied tenancy from year to year, arising from payment of rent after the expiration of a lease, that by his doing so his right to compensation, which undoubtedly existed at the end of the lease, is absolutely gone and forfeited? I confess I do not think such a consequence follows from either the decisions or from any words in the statute of 1870, and I conceive it to be opposed to the spirit and intention of that statute. Then suppose the same person to submit to an increase of rent whilst he is tenant from year to year, would that circumstance make such a difference as to debar him from compensation for the improvements in question? In my opinion it would not. The tenancy itself is not changed by an increase of rent. I should, therefore, be of opinion that in the

(1) R. & L. A. 82.

(2) 5 I. L. T. R. 38.

present case David Adams might, on quitting his holding, claim compensation in respect of improvements on his holding made by his father, as being his predecessor in title. Such is my opinion on the construction of the Act of 1870. And it follows in my opinion (apart from the question of compensation by the landlord, with which I shall deal hereafter), that under sect. 8, sub-sect. 9, of the Land Act of 1881, no rent should be allowed or made payable in respect of those improvements. But there is a further question, namely, whether the 7th section of the Act of 1881 can be considered as in any way affecting the construction of sect. 8, sub-sect. 9, of the same Act. The 7th section, so far as is material, is as follows :—

“A tenant on quitting a holding of which he is tenant shall not be deprived of his right to receive compensation for improvements under the Landlord and Tenant (Ireland) Act of 1870, by reason only of the determination, by surrender or otherwise, of the tenancy subsisting at the time when such improvements were made by such tenant or his predecessors in title, and the acceptance by him of a new tenancy.

“Where, in tracing a title for the purpose of obtaining compensation for improvements, it appears that an outgoing tenant has surrendered his tenancy in order that some other person may be accepted by the landlord as tenant in his place, and such other person is so accepted as tenant, the outgoing tenant shall not be precluded from being deemed the predecessor in title of the incoming tenant by reason only of such surrender of tenancy by him. The Court, in adjudicating on a claim for compensation for improvements made before any such change of tenancy or of tenants, shall take into consideration all the circumstances under which such change took place, and shall admit, reduce, or disallow altogether such claim as to the Court may seem just.”

This section was plainly intended to meet what was supposed to have been decided in *Holt v. Harberton* (1). It purports to provide for the twofold case—first, the case of the determina-

(1) R. & L. A. 82.

tion, by surrender or otherwise, of the tenancy subsisting at the time when the improvements were made by the tenant or his predecessor in title, and the acceptance by him or them of a new tenancy; and secondly, for the case, common especially in Ulster, of a tenancy being transferred, not by assignment, but by surrender of the old tenancy and the creation of a new one in the person of the new tenant. But certainly, if we assume that before the passing of the Act the term "predecessor in title" had acquired a definite construction, and that, according to this construction, no person could be deemed a predecessor in title whose tenancy had determined or been surrendered, and a new tenancy accepted by him before the tenant who claims compensation had become tenant, and if the same construction is to be applied in interpreting sect. 7, it appears to me that the first paragraph of that section is deprived, not only of all efficacy, but of all meaning. Take a case such as *Milliken v. Hardy* (1). If the same case arose now, and if the claimant relied on the change of the law effected by sect. 7, he might be answered in this way—"Under sect. 7, in order to entitle you to claim for improvements, the person by whom the improvements were made must have been your predecessor in title, which the person who made the improvements for which you claim was not." Therefore, to give an intelligible construction to the first paragraph of the section, it is necessary to read the words "predecessors in title" as if they meant "those who, but for such surrender or merger, would have been his predecessors in title," or some words to that effect. The second paragraph is more clearly worded, and under it when a tenant surrenders his tenancy, in order that another may become tenant in his place, the former may be deemed the predecessor in title of the latter, notwithstanding the surrender. It is to be observed that in both paragraphs the words "by reason only" are used, showing that there may be attendant circumstances which might operate to bar the claim for compensation, and the concluding paragraph of the section expressly enacts that all the circumstances under

(1) 9 Ir. L. T. R. 79.

which the change took place shall be taken into consideration towards the admission, reduction, or disallowance of the claim. I am of opinion that the effect of the 7th section taken in its entirety is, that in construing the Act of 1870 a prior tenant may be deemed the predecessor in title of a subsequent one, if in reality and substance the tenancy is derived by the latter from the former, notwithstanding that, by reason of determination or merger or surrender, the tenancy of the latter may not be strictly the same tenancy that was held by the former.

We have now to consider what bearing, if any, the 7th section has on the 8th. Sub-sect. 1 of the 8th section directs that in fixing a fair rent regard shall be had to the interests of the landlord and tenant respectively, and to the circumstances of the case, holding, and district. Under that sub-section it is clear that regard must be had to the interest of the tenant in such improvements as he would be entitled to compensation for under the Act of 1870, as amended by sect. 7 of the Act of 1881. Therefore, if improvements had been made by a person who would not have been deemed a predecessor in title according to the decisions on the Act of 1870 to which I have referred, but who would be deemed such predecessor in title under sect. 7 of the Act of 1881, the interest of the tenant in those improvements must be had regard to. Then after the intervening sub-sections comes sub-sect. 9, enacting that no rent should be made payable in respect of improvements made by the tenant or his predecessors in title unless compensated for by the landlord. Are we to read the words "predecessors in title" here in their strict technical signification as if sect. 7 had not been passed? If so, this consequence would follow:—Suppose a tenant to have made improvements, and, desiring to sell his tenancy to another, effected such sale by way of assignment, his assignee could not, in fixing a fair rent, be charged with any rent in respect of those improvements; but if on the other hand he carried out the sale by the method so common especially in the North of Ireland of having the vendee entered as tenant in the books of the estate, thereby effecting a surrender of his tenancy by act and operation of law, in that case, although the object arrived at

was identical, the incoming tenant could be fixed with rent in respect of the improvements of his predecessor because in strictness of law he was not his predecessor in title. Such it is contended is the construction to be put upon the words "predecessor in title" under sub-sect. 9 of sect. 8 of the Act of 1881, although it is conceded that sect. 7 of the same Act makes it otherwise if compensation were sought for under the Act of 1870. This seems to me to lead to great difficulty. By the last paragraph of sect. 57 of the Act of 1881 it is provided that—

"Any words or expressions in this Act which are not hereby defined, and are defined in the Landlord and Tenant (Ireland) Act, 1870, shall, unless there is something in the context of this Act repugnant thereto, have the same meaning as in the last mentioned Act; and the Landlord and Tenant (Ireland) Act, 1870, except in so far as the same is expressly altered or varied by this Act or is inconsistent therewith, and this Act, shall be construed together as one Act."

No definition of the term "predecessors in title" is given by either Act; but construing the Acts as one Act, and finding that by sect. 7 of the Act of 1881, the words "predecessors in title" obtain, as regards the Act of 1870, a construction which looks to the substance and reality of the succession, and not its merely technical form, why should we not give the same construction when dealing with the very next section of the Act of 1881? In my opinion, on the soundest principles of the construction of statutes, we are at liberty to do so. Let us suppose that the Act of 1870 had been differently construed, and had been held to embrace (as was suggested by Chief Baron Pigot) not only those who had been in possession of precisely the same estate, but those who had substantially been the predecessors of the claimant in the holding, though the actual tenancy which they held had been determined by surrender and acceptance of a new tenancy, in that case must not a similar interpretation have been put upon the words in sect. 8, sub-sect. 9, of the Act of 1881. But if instead of judicial decision we have in sect. 7 of the Act of 1881 what is tantamount to a statutory interpretation of the Act of 1870, should not the same principle be applied?

I know it has been stated and has in the present case been urged as an argument against this view, that such a construction would sweep away from the landlord's rent all improvements that from time immemorial had been executed on the soil, and leave nothing subject to rent but the waste and unimproved value of the land itself. Such an apprehension appears to me chimerical. In the first place, the fact of the improvements themselves requires to be proved. In the next place, as regards all improvements made before the 1st August, 1870, there are distinct limits placed to the presumption that such improvements were made by the tenant or his predecessor in title, and everything outside the statutory presumption must be proved; and although a formal surrender and acceptance of a new tenancy would no longer form a break in the title, yet the title must in reality and substance be traced from the tenant who executed the improvements to the tenant who claims in respect of them. I have so far dealt with the improvements made by John Adams, during the currency of the lease, but there are, moreover, the buildings which were erected by M^cKee before the execution of the lease. If I be right in thinking that the extension of the meaning of the term "predecessors in title" effected by sect. 7 should be held also to govern sect. 8, sub-sect. 9, these buildings also should (apart from the question of compensation) be excluded from consideration in fixing a fair rent. But in truth, having regard to what was admitted as to the offer and expectation of a lease, and to the fact that the valuation of 1842 was plainly made with a view to the granting of leases by Lord Mountoashel, I think it difficult to exclude those buildings from coming under the principles which govern the question of the improvements made during the currency of the lease.

I now come to the second part of Mr. Holmes's third requisition, which raises a question possibly surpassing in importance any other in this case.

He contended that the landlord was entitled to some rent in respect of improvements made during the currency of the lease. He put this in a twofold way. His first ground was

that under the first clause of sect. 4 of the Act of 1870, some deduction must be made, in ascertaining the tenant's interest in such improvements, from the value thereof. That would be so as regards improvements made prior to the Act of 1870, if we had only to consider the first sub-section of sect. 8 L. L. (Ir.) Act, 1881. But sub-sect. 9 is peremptory in its terms, and absolutely forbids the allowing of any rent in respect of improvements made by the tenant or his predecessors in title, "for which, in the opinion of the Court, he shall not have been paid or otherwise compensated by the landlord or his predecessors in title." Mr. Holmes's second ground is that the tenant, by holding under a lease, has been, if not altogether, to some extent, compensated for his improvements. The words of the sub-section are "compensated by the landlord." It is not as under the last clause of the Act of 1870, with respect to improvements prior to that Act (for with such improvements alone does the clause deal) that mere enjoyment of the advantages of the improvements reduces the tenant's claim. Under the Act of 1881 the compensation must emanate from the landlord. In order to enable him to claim rent in respect of the tenant's improvements, he must, so to speak, have bought them from the tenant, paid him for them, or otherwise compensated him. What amounts to such a compensation? It may take a hundred forms which it would be impossible to enumerate, but it must, I conceive, be something given or done or foregone by the landlord as an equivalent for the improvements. We are not called on to decide whether a lease given at a low rent in order to enable the tenant to improve might not in some cases be held to be compensation, nor whether in the case of tenancies from year to year the landlord's abstention for a considerable period from the exercise of his legal right to evict the tenant or enforce a larger rent from him by menace of eviction might not, in some cases, be deemed compensation by him. Every case of that kind would, I conceive, be governed by its own special circumstances. But when improvements are simply made during the currency of a lease, without any special circumstances, what equivalent is there? It has been said that

the giving over to the tenant of the soil with its natural powers is in itself a compensation. But could that have been meant by the legislature? If so, the tenant is worse off in this respect, under the Act of 1881, than he was under the Act of 1870; for under the Act of 1870 enjoyment of the advantages of improvements forms no ground for reduction of the tenant's claim to compensation, as regards improvements effected since the Act. But if the contention now put forward as to the construction of the Act of 1881 be well founded, then in every case, future as well as past, the mere enjoyment of his own improvements would compensate the tenant. Let us take the case of two neighbouring tenants holding under lease for the same term and at the same rent—say £30 a-year each. One tenant, by industry and outlay, effects improvements which make the holding worth £60 a-year; the other does not improve at all, and his holding remains worth £30. At the end of the lease is the landlord, under this Act, to be entitled to assess the improving man at the full letting value of his holding, on the plea that he had compensated him? It seems to me that this would simply be a judicial repeal of the clause. In this view MR. LITTON concurs; but I regret to say that our colleague MR. VERNON—for whose opinion on all subjects connected with land, indeed I may say all subjects whatsoever, I have learned to have the greatest esteem—does not take the same view, and thinks that our construction would work great injustice and hardship upon landlords. It is satisfactory to reflect that the Court of Appeal will soon put the question at rest.

Having thus said what occurred to me on these very difficult and important questions of law, I now come to the question of value, on which it is not my intention to dwell long, nor to recapitulate the evidence which has been given. We found that the usual mode of valuing land in Ulster for the purpose of regulating rent was to put an estimate on the tenant's interest and on the landlord's interest respectively, and to fix a fair rent, on the principle of not including the tenant's improvements, so as not seriously to affect his tenant-right. We

found this mode of valuing common to valuers produced both on the side of the landlord and that of the tenant. Another mode of valuing is, of course, to take the land as it stands, value it as it would be set to a solvent tenant by an equitable landlord, and from the rent so fixed to deduct what should properly be allowed to the tenant in respect of improvements. So habituated are the people here to the former mode of valuing, that some of the witnesses, when asked what the land would fairly set for in the hands of the landlord, said they had never considered it from that point of view. Mr. Raphael, who had fixed the rent in 1876, gave a valuation, field by field, stating the acreage of each field, and the rent it ought to bear per acre. The valuation, he said, was made on the basis of fixing in every case the acreable rent at such a figure as would not interfere with the tenant's improvements. He adhered to his valuation of 1876, and declared that the rent of £31 17s. 6d., with the addition of £4 10s. for the bog, making together £36 7s. 6d., was now the fair rent. Mr. Edward Murphy, a gentleman of high reputation as a valuer, said he valued the land in the same way, field by field, making in each case an exclusion, in his own mind, of the tenant's improvements as he valued. His estimate of the fair rent is £30 2s. 11d. for the land formerly in lease, which, adding £4 10s. for the bog, would make his estimate of a fair rent for the entire £34 12s. 11d. On the other hand, the valuers for the tenant went far indeed in their reduction. Mr. Robinson says he conceives that the lands, if in the hands of the landlord, might be worth £44; yet, excluding the tenant's improvements, he brings the rent as low as £22 2s. 3d. Our official valuers, Mr. O'Brien and Mr. Gray, gentlemen of high ability and unimpeachable integrity, fix the setting value of the land at £37 10s. If this were to be deemed their estimate of a fair rent, there would be an increase of the actual rent fixed by Mr. Raphael. But this is by no means so. They merely excluded the buildings from their valuation, in other respects valuing the land as it stood; and from their valuation, therefore, if I be right in the construction of the statute, reduction must be made in respect

of tenants' improvements other than buildings. Mr. M'Mordie conceived it to be his duty, on behalf of his clients, to assail with no little asperity the reports of these gentlemen. As we had determined that their reports were to be given to the parties for comment, we cannot, of course, blame an advocate for any criticism upon them which he may deem just. But I did distinctly call Mr. M'Mordie's attention to the fact that in attacking those reports he quite misapprehended their basis. In my opinion, the rent of £37 10s. fixed by the valuers would, if an allowance be made for improvements other than houses, reduce the rent at the least to the judicial rent. There remains, then, the judicial rent itself. Mr. Holmes, in his first proposition, submits to us that this Court is not entitled in hearing these cases to have any regard to the so-called valuation made by the Assistant-Commissioners. Now, with all respect to Mr. Holmes, this also is a misapprehension. The Assistant-Commissioners are not valuers by profession but Judges, appointed either as being members of the profession of the law or from their acquaintance with the value of land in Ireland. They decide, like other tribunals, on sworn evidence. It is true that by one of our Rules they ought personally to visit the lands in every case in which they deem such visit will conduce to a just decision, and that duty they have, I believe, in every case discharged. By the "so-called valuations" I can understand nothing but their judicial decisions, based not alone upon their own inspection, which might of itself be an insufficient guide, but assisted greatly by such inspection in deciding the whole case upon the evidence. Their decision comes before us on appeal. If the Sub-Commission have erred in principle, or can be shown to have erred seriously in amount, our plain duty is to vary their order. But is it our duty simply to decide as if we were Judges of a Court of first instance? and if in our own opinion the judicial rent should to some extent be either greater or less than that fixed, are we to vary the decision? If so, two consequences ensue—first, in hardly a single case could the decision of the Sub-Commission stand; for it is almost a moral impossibility that in a matter of opinion, such as value, two independent minds could arrive at

precisely the same conclusion; secondly, that the Sub-Commission might as well not exist, we, the Commissioners, having to decide *de novo* the value of every farm which has come into Court. But such, I apprehend, is not, and was never considered to be, the duty of an appellate tribunal. I will cite a passage from Lord Chelmsford's judgment in the case of *Gray v. Turnbull* (1). He there says:—"Upon a question of fact, an appellate tribunal ought not to be called upon to decide which side preponderates in a mere balance of evidence. Different minds will, of course, draw different conclusions from the same facts, and there is no rule or standard which can be referred to by which the correctness of the decision either way can be tested. If we were, upon the present occasion, to come to the conclusion that the five Judges who have decided in favour of the defendant miscarried, we should just as likely be wrong in our conclusion from the fact as they were in deciding the other. And, therefore, if there is to be an appeal on questions of fact—and I regret that there should be such—I think that this principle should be firmly adhered to—namely, that we must call upon the party appealing to show us irresistibly that the opinion of the Judges on the question of fact is not only wrong but entirely erroneous." The same principle has been over and over again enunciated by Judges of Appeal. It has been said that this is not strictly an appeal, but a rehearing. But now under the Judicature Act, every appeal is by way of rehearing. In fact this, and the other cases, have been very fully and very carefully reheard by us. Now, without saying that these strong expressions of Lord Chelmsford are to be adopted fully in cases like the present, I say this—Show us that the Assistant-Commissioners were in any way wrong in principle, or even clearly wrong in fact, and we will not hesitate to reverse them. But it would be absurd to do so for trifling differences. We therefore confirm the judicial rent.

There remains the question of costs. The Sub-Commissioners have given the tenant his costs against the landlord.

(1) L. R. Sec. Sc. App. 53.

This we conceive to have been an error. They thought it right, we conceive, to follow the general rule of our Courts, by which costs follow success. But this principle is, in our opinion, inapplicable to Courts such as ours. I do not term them Courts of arbitration. They would only in strictness be so if landlord and tenant came in together. But they are Courts established by the legislature to determine impartially a matter upon which various minds may reasonably differ in opinion; and (exceptional cases apart) it would, in our judgment, be unfair to visit either party with costs in such a case. Of course, if the conduct of either party is such as to deserve reprobation, we may treat such cases as exceptions. The costs of the appeal are a different matter. An appellant comes into Court at his peril to set aside a distinct judicial decision. No doubt, as a general rule, an appellant who fails should pay the costs of the appeal; and hereafter, when the principles upon which the Court proceeds become more fixed and definite, it will be, we think, our duty to act upon this rule; but as yet they are, to a great extent, floating and indeterminate, and we cannot say that an appellant, especially in a case like the present, where questions of law of such moment are involved, was wrong in seeking to test the decision given below. We, therefore, vary the order of the Court below by declaring that the parties respectively should bear their own costs, and we give no costs of this appeal. We shall suspend, however, the formal making up of an order until the decision of the Court of Appeal be stated, as if that Court should dissent from the principles I have laid down as to the tenant's improvements, it will follow that our decision as to value, based on those principles, may require reconsideration.

MR. COMMISSIONER LITTON, Q. C. :—

In expressing my concurrence with the judgment which has been pronounced by the learned Judge, and while I do not intend to travel over the ground so ably occupied by him by entering in detail into the considerations which have induced the Court to arrive at the conclusion announced in this case, I think it to be my duty to make some observations of a

general character upon the principles which should regulate the action of the Court in arriving at a "fair rent," and in applying the provisions of the 9th sub-sect. of sect. 8, with regard to improvements made by the tenant or his predecessors in title. I concur with Mr. Holmes, and indeed I may say with the opinion expressed by all the counsel and solicitors who have been engaged in the cases before us, that it is desirable that this course should be taken at the earliest possible moment. The public mind is much exercised on the subject, and both landlords and tenants have a right to expect the Court to lay down some rules which, if not applicable to all cases, may at least afford some guidance in their relations with each other, and which may as far as possible facilitate and induce reasonable settlements out of Court—a course which, in my mind, no effort on our part should be spared to secure. Now, confining myself to the inquiry which principally concerns this Court, and in which the various Sub-Commissions have been engaged, the object and aim is to ascertain the fair rent which, having regard to the language of the statute, the tenant in occupation should pay to his landlord for his holding—an inquiry extremely simple to state, but difficult beyond expression to define or answer—the fair rent, considering all the circumstances of the case, holding, and district—considering the interest of the landlord and tenant respectively, and considering that no rent is to be allowed or made payable in respect of improvements made by the tenant or his predecessor in title, and for which he has not been paid or otherwise compensated. Now, I do not affect to define a fair rent—to do so is almost, if not altogether, impossible—and for this reason, if for no other, that a different estimate of what is fair as regards almost every action in life will be arrived at by different men, as the character of each may have been formed under those influences which conduce to make some men intuitively reasonable and just, and others exacting and ungenerous. The question of rent forms no exception to the general rule, and the estimate of a fair rent is, within certain limits, as uncertain as the character of the man to whose judgment the question is submitted. The great object, however, should be to arrive at a result in the particular case

which will commend itself as just, not to one class or to the other class, but to reasonable men in both classes; and it would be unwise to even attempt a definition which, however applicable to some particular case, would mislead in the effort to make it of general application. Still, it is right to point out considerations which should be entertained, and considerations which should be rejected. The rule suggested by the Bessborough Commission, if we guard it by one or two limitations, appears to me to commend itself to the judgment as indicating the direction of the inquiry. The members of that Commission state:—"The computation should, in general, start with an estimate—first, of the gross annual produce; and secondly, of the full commercial rent according to the rules observed by the best professional valuers. From this last should be deducted, as a rule, any portion of the annual value which is found to be due to improvements not made or acquired by the landlord." We should, in my mind, ask ourselves in each case, and as far as possible discover from the evidence, what annual sum could a tenant of ordinary capital, skill, and intelligence afford to pay, one year with another, for the holding as it stands, with all its surroundings, regarding the circumstances of the holding and district, and assuming that the landlord had the farm in his own possession to let it to a solvent tenant. The question is not what a tenant could be got to offer, but what he could be reasonably asked to pay; and, consequently, in answering these questions, we should exclude from consideration, in my opinion, any increase of rent which persons might be induced to offer from a mere desire to acquire possession, or which might be procured by reason of circumstances affecting the person making the offer, and not affecting the holding itself. While, then, we should endeavour to ascertain the commercial or market value of the holding as it stands, we should exclude the competition value. The owner of land about to let a holding in his own occupation may demand whatever rent he pleases, and take whatever rent he can procure. It may well be that the desire to procure possession, or the hunger for land, will induce some persons to offer a rent far beyond the value. Nevertheless, the owner has a perfect right

in such a case to refuse to accept less; he has a perfect right to the competition rent; but in estimating the rent between the landlord and the "present" tenant (that is, the tenant in occupation), whatever might be procured, from the motives I have referred to, beyond the commercial rent, belongs to the tenant who holds the possession, just as it would belong to the landlord if about to let his land for the first time. It forms the element of good-will, and is part of the tenant-right or property of the tenant in possession. It may be said that there is no difference in principle between a commercial or economic and a competition rent. This may be true, and in the case of the owner is true, but in the case of the tenant in possession the landlord has not the possession to give, and, therefore, cannot claim the competition value. That which he can claim, and has a right to, is the competition value, less by whatever should be deducted as representing mere possession, which is a property in itself. The competition value, less by the good-will arising from actual occupation, I call the commercial value of the holding. The term may be somewhat inaccurate, but I know no better to express my meaning. From the result thus ascertained must be deducted the amount which the improvements of the tenant or his predecessors in title have contributed to the present letting value. The amount to be deducted is not of necessity to be estimated by the annual equivalent in the way of interest for the sum expended. It may so happen that large sums have been expended in the effort or with the intention to improve, and yet the holding, in its letting value, may not have been improved by the expenditure. The question, therefore, is, to what extent has the letting value been increased by the improvement, if at all? Deducting the latter, when ascertained, from the former, we get a result which ought to represent a fair rent. The amount deducted ought to represent that portion of the value which is independent of the property in simple occupation, and apart from what may be referred to the character of the landlord, which in some places has raised the tenant-right to an excessive figure, and which latter is an element, in my opinion, to be wholly disregarded.

It should be understood—and on this point there should be no mistake—the Act of Parliament never intended, and it would be manifestly unjust, to fix a rent below the commercial value of the holding, as I have defined commercial value, reduced by the value of the tenant's interest in his improvements. The course or rule suggested leaves the tenant-right, so far as it is derived from occupation, untouched; and, so far as it is derived from improvements, gives full effect to it in reducing the commercial rent by the value of the tenant's improvements. In no other way can you fulfil the requirements of the Act in having regard to the interest of the landlord and tenant respectively. To act otherwise would be to transfer the property, or a portion of the property, of one class to the other class; and to no extent ought this to be done. If it is our duty to recognise the tenant's interest, it is equally our duty to recognise that of the landlord, and we are bound by the highest considerations of duty to administer an Act which was intended to secure right in such a manner as that it may not become in our hands the instrument of wrong.

Again, it appears to me impossible to allow the personal qualifications or disqualifications of the occupying tenant to enter into our estimate, or to discuss whether a man can or cannot live in comfort on the particular holding. The inquiry concerns the land, its productive qualities, its commercial value, and not the condition of the tenant, his manner of life or the number of his children. If the latter considerations were to be admitted, the result would be that some holdings where very small should be subjected to no rent, in order that the tenant might live and support his family in comfort. In numerous cases the remission of all rent would not secure that result, and the rent ascertained on such a principle to be fair to-day would be to-morrow unfair, if the holding passed into the hands of a man with a larger family or of a less thrifty character. I only notice this doctrine to repudiate it.

I now proceed to make some remarks with respect to the construction of the Act as it, in my mind, affects the question of improvements in connexion with the imposition of rents, a

most important and vital question. By the 4th section of the Act of 1870 the tenant, on quitting his holding, was entitled to claim compensation for improvements made by him or his predecessors in title. The same form of expression is used in sect. 8, sub-sect. 9, of our Act with regard to the imposition of rent: "No rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by the tenant or his predecessors in title." If the case rested here, I, for my part, would feel bound, in placing a construction upon the expression "predecessors in title," to follow the cases which have been decided on the 4th section of the Act of 1870. The case of *Holt v. Harberton*, and other cases of the same class with which we are familiar, whatever may be said of them, when closely examined, undoubtedly narrowed the effect of the 4th section of the Act of 1870. Dealing with the two Acts as part of one code, I would have felt bound to follow the general result of those decisions when dealing with the like expression in relation to the fixing of a fair rent. The 7th section of the Act of 1881, however, purports to affect and remedy the result of the cases to which I have referred in relation to the 4th section of the Act of 1870, for it declares that the tenant shall not be deprived of his right to compensation for improvements made by himself or his predecessors in title by reason of the determination of the tenancy subsisting at the time the improvements were made, by surrender or otherwise, and acceptance of a new tenancy; and that the outgoing tenant, who surrenders in order that some other person may be accepted as tenant in his place, is to be deemed the predecessor in title of the incoming tenant. The technical and restrictive construction put upon the expression "predecessor in title" by the cases decided upon the 4th section of the Act of 1870 has been thus got rid of by the enactment in the 7th section of the Act of 1881; and when the new tenancy is accepted in place of the old, or when an outgoing tenant surrenders his interest in order that an incoming tenant may take his place, the continuity of title is to be taken as not interrupted. If the law be thus altered in the case of claims for compensation for improvements,

it leaves the Court free to construe the expression "predecessor in title," in the 8th section, sub-sect. 9, in accordance with the legislative declaration of its meaning when it occurs in the 4th section of the Act of 1870. If we now refer to the 9th subsection of sect. 8, the language, in my opinion, plainly has reference to *past* as well as *future* improvements. The declaration is most distinct: "No rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by the tenant or his predecessor in title, and for which in the opinion of the Court the tenant or his predecessors in title shall not have been paid or otherwise compensated by the landlord or his predecessors in title." I wish, in passing, to lay stress upon the latter words of the clause, for they are of great importance, and I shall have to refer to them presently. It is plain, then, that no rent can be placed upon a holding in respect of any improvements *proved* to have been made by the tenant or his predecessors in title within the meaning given to the expression by the 7th section, no matter when made, and no matter whether the landlord's estate has been the subject of sale subsequent to the improvements or not. This rule in its application is, however, subject to the limitation that the tenant has not been paid or otherwise compensated, and it is also subject to the direction in the first clause of the same section, that in ascertaining the fair rent the interest of the landlord and tenant respectively shall be regarded. When, then, actual proof is given as to the making of the improvements, no length of time precludes the tenant from insisting that no rent shall be charged in respect of them. But where no proof is adduced, or capable of being adduced, as to by whom the improvements were made, the question is, what course should be taken? In such case, it appears to me, the 5th section of the Act of 1870 affords the principle which should be applied. It provides that all improvements made within twenty years prior to 1870 shall, until the contrary be proved, be presumed to have been made by the tenant or his predecessors in title, subject to certain important exceptions. This presumption in favour of the tenant cannot, in my opinion, in

either reason or law, be further extended. Lapse of time weakens the presumption. Mr. Gresley, in his work on evidence—a work of the highest authority—quotes the following observation of Sir W. D. Evans:—"The effect and weight of presumption cannot be influenced by any consideration more extensively than by the opportunity which the nature of the case affords to support or contradict it by direct testimony." In other words, the presumption which exists in favour of the tenant must cease to exist when once we reach a time when it would be unreasonable to expect that evidence would be forthcoming to contradict it.

Bearing the foregoing observations in mind, and in the first place regarding tenancies from year to year, the enactment in sub-sect. 9 must apply to all such tenancies, notwithstanding that a change or changes may have taken place in the occupation by reason of sale, devise, or intestacy, or by reason of a surrender taking place in order to admit a new tenant, or by reason of an alteration in the rent. In all such cases the former occupier, whether the same or a different person, is the predecessor in title of the latter, and only ceases to be so where a new tenancy is created with a tenant who has not been in some privity with the former tenant in person or estate, or where the old tenant enters into a contract so entirely new as to justify the conclusion that it has been entered into by the landlord in consideration of the tenant releasing his rights. With regard to holdings, under lease or otherwise, in cases where the interest of the former lessee has been surrendered for the purpose of creating the new interest, or where, the lease having expired, the late lessee in occupation converts the tenancy which arose on the termination of the expired lease into a new leasehold interest, the mere fact that there has been a change of rent, or that the conditions of the tenancy were reduced to writing, or were embodied in an instrument under seal, will not deprive the lessee under the new lease of the right to claim when his lease expires to be successor in title to the former tenant, and to have the benefit of the improvements made by such former tenant, unless, I must repeat again, the lease was

granted or accepted as compensation for the former improvements—a fact which I am of opinion the Court may or may not infer from the acts of the parties and the circumstances of the particular case. And here the importance of the closing words of the 9th sub-section cannot be overlooked. On each occasion of a new lease granted by the landlord and accepted by the tenant in substitution for the former tenancy, although there may have been no break in the continuity of title (and in most cases there will be none under the law as regulated by the present statute), the Court is bound to consider, from the circumstances of the case, how far the consideration for such lease may have included the surrender to the landlord by the tenant of the prior improvements, or how far, by executing the lease, the landlord, in the words of the section, compensated the tenant for his past improvements.

Enjoyment by the tenant during the continuance of a lease, no matter for how long, cannot be regarded as compensation for improvements made during the lease, and not contracted by the lease to be made. In this respect I consider the concluding paragraph of the 4th section of the Act of 1870, if it be not, as pointed out by the learned Judge, confined to improvements made before that Act, is repealed by the 9th sub-section of sect. 8 of our Act. The words “paid or otherwise compensated” by the landlord must mean either actual payment or some positive and direct consideration moving from the landlord to the tenant, and not an enjoyment of occupation, which has no reference to the improvements one way or the other. Nor, in my mind, can occupation as tenant from year to year, after the expiration of a lease, be deemed compensation, unless it be expressly shown that such occupation was permitted with direct regard to the antecedent improvements, and for the purpose of compensation. The duty imposed on the Court in fixing the rent, “to have regard to the interest of the landlord and tenant respectively;” and the further duty to consider whether the tenant has or has not been compensated by the landlord for his improvements, taken in connexion with the declaration that no rent shall be allowed or made payable in respect of improve-

ments made by the tenant or his predecessor in title, appear to me to afford ample power to the Court to do what is just between the parties by recognising the property and the rights of each. I do not propose to occupy time by applying the principles I have endeavoured to lay down to the particular facts of the present case. It is enough to say they are the principles by which in the present case I have tested the evidence, and by which I am prepared to test the evidence in all similar cases. Acting accordingly, I have expressed my concurrence in the result arrived at in this case of *David Adams v. Dunseath*; and I only wish to say, in conclusion, that I entirely endorse the observation of the learned Judge as to the rule which should regulate the action of this Court as to costs, both in the Court of first instance and in this Court of Appeal.

MR. COMMISSIONER VERNON :—

Sitting in this Court as a judge of fact, not of law, it would be presumption on my part to attempt to follow my learned colleagues through the elaborate judgments which they have delivered.

I can only say that in some important points their judgments do not carry conviction to my mind, and I learn with satisfaction that they are to be submitted to the High Court of Appeal without any delay.

These judgments appear to me to lay down principles, and to lead to results which were never contemplated by the legislature. I am, therefore, obliged, with much diffidence in my own opinion, but without any hesitation as to my duty, to dissent from their judgments.

It follows that dissenting from the judgments I dissent from the valuations arrived at, so far as those valuations are governed by the principles laid down in reference to the meaning and force of the words "otherwise compensated."

Solicitors for the Tenant : *Messrs. Caruth & Currie.*

Solicitors for the Landlord : *Messrs. H. & A. Orr.*

FEBRUARY 10, 11, 15, 28, 1882.

COURT OF APPEAL (1).

ADAMS v. DUNSEATH.

THIS case came before the Court on appeal, on a Case Stated by the Court of the Land Commission.

Held,

The word "improvements," in section 8, sub-section 9, L. L. (Ir.) Act, 1881, must be construed as defined in the Landlord and Tenant Act, 1870. "Improvements" mean not the increased letting value produced by the improvement-works, but the improvement-works themselves.

Held (diss. MAY, C. J., MORRIS, C. J., and DEASY, L. J.):—

That "predecessor in title," section 8, sub-section 9, L. L. (Ir.) Act, has the same meaning as in section 7 L. L. (Ir.) Act, 1881.

Held (diss. LAW, C.):—

That the provisions of the final paragraph of section 4 of the Land Act, 1870 (as to a tenant claiming compensation for improvements made before the passing of that Act), are applicable to such improvements in determining what is a "fair rent" under section 8 L. L. (Ir.) Act, 1881.

Held,

That where a tenant during the currency of a lease makes improvements, the enjoyment thereof by him or his successors during the currency of the lease is not "compensation by the landlord" within the meaning of section 8, sub-section 9, L. L. (Ir.) 1881.

Held (diss. LAW, C., SULLIVAN, M. R., and PALLES, C. B.):—

That the lease made in 1846, whereby lands were demised, with all houses and buildings thereunto belonging, and containing the usual covenants, precluded the tenant from being regarded as having any interest in respect of a house built by him on the land before the execution of that lease, in determining what is the fair rent of the holding, under section 8, L. L. (Ir.) Act, 1881.

Per LAW, C.:—

That section 8, sub-section 9, secures against the imposition of rent only the improvement-works, that is, their yearly value, leaving any increased value beyond that to be dealt with under the earlier part of section 8, as may, under all the circumstances, be considered just and fair.

(1) Before LAW, C.; MAY, C. J.; SIR E. SULLIVAN, M. R.; MORRIS, C. J.; PALLES, C. B.; DEASY, and FITZ GIBBON, L.JJ.

That "predecessor in title," in section 7, does not necessarily mean predecessor in the *same* title, but simply denotes a series of tenants who have transmitted from one to the other their respective tenancies or titles to the possession of a holding, whatever those tenancies or titles may be, and whatever changes they may have undergone, and is used in the Act of 1881 to describe a line of tenants preceding each other in the same farm, though by different titles or tenancies. "Predecessor in title," in the case of a landlord, denotes the substantial devolution of title to the reversion, and in the case of a tenant denotes the substantial devolution of title to the possession from predecessor to successor.

That the provisions of the final paragraph of section 4 of the Act of 1870 are not applicable in deciding what is a fair rent under section 8 L. L. (Ir.) Act, 1881, because such application is directly and explicitly prohibited by section 8, sub-section 9, enacting that no rent shall be made payable in respect of any improvements whatever belonging to the tenant. The L. L. (Ir.) Act, 1881, section 1, places every tenant practically in the same position as tenants under the Ulster custom, so far as regards the right of sale, *i. e.*, it gives him a right to sell his tenancy as it stands, improvements included; and in the fixing of a fair rent a tenant has a similar right to be credited with the entire of the present value of his improvement-works, whether executed before or since August 1, 1870.

That "true value," in section 1, sub-section 3 L. L. (Ir.) Act, 1881, means what the holding would *bonâ fide* bring in the open market if sold to an unobjectionable purchaser.

That there was nothing in the lease of 1846 to estop the tenants from claiming the interest in the house built before its execution, or as compensation for the building, or which could be construed as an express exclusion of the right to compensation of those houses, &c., such as is required by proviso 2, section 4, of the Act of 1870. It was a matter of fact for the consideration of the Land Commission whether the lease was given in consideration of or compensation for the building.

Per MAY, C. J. :—

Section 7, L. L. (Ir.) Act applies to cases of transmission of tenancies, not by assignment in the proper sense of the word, but by surrender by the outgoing and acceptance by the incoming tenant of the same tenancy, and only where a tenant is quitting his holding. "Predecessor in title" should continue to bear the meaning given it in *Holt v. Harberton*.

That the lease of 1846, in any view of the case, should be regarded as compensation wholly or partially for the house built before its commencement.

That the appeal from the decision of the Sub-Commissioners to the Land Commissioners should be regarded as a re-hearing, in which the whole case is open and fresh evidence may be adduced; the tribunal of appeal should form its independent judgment on the facts.

Per SULLIVAN, M. R. :—

That “improvements” must mean the interest of the tenant who made the improvement-works, measured by the money expended on them, as declared and limited by the Acts of 1870 and 1881, and the duty of the Commissioners in determining a fair rent is to assess what would be a fair allowance for the tenant’s expenditure, checked and qualified by the consideration of what he would get on leaving his holding under the Act of 1870.

That “predecessor in title” must be taken as defined in section 7 L. L. (Ir.) Act, 1881, a paramount object of the Acts of 1870 and 1881 having been to preserve the tenant’s right to the value of his improvements.

That a tenant, on quitting his holding, should get compensation for improvements made by himself or any former occupant, notwithstanding any change of tenancy, no matter how caused; and a new tenant, getting a holding from the former occupant, should have his right to compensation untouched, unless in creating the new tenancy this right to compensation was bargained for or lost by some arrangement. The right of the tenant to compensation for improvements is almost, if not entirely, correlative with his right to be exempted from rent in respect of them, and is really the basis of section 8, sub-section 9, and, therefore, the meaning of “predecessor in title” in section 7 must be extended to section 8.

That the “improvements” in section 8, sub-section 9, must be taken as not merely defined in the Act of 1870, but with the qualifications attached thereto by that statute.

That the true value to be fixed by the Court in case of sale cannot be the market value, as then the whole increased letting value caused by improvements would become the property of the tenant; the true value must be what, having regard to the interest of landlord and tenant respectively, would be the true estimate of price between them.

That no contract is necessary towards getting at a “compensation otherwise than by payment by the landlord;” nor is any threat or menace of eviction on the part of the landlord necessary; but to bar the tenant on change of tenancy of right to compensation for improvements, or of benefit of section 8, sub-section 9, L. L. (Ir.) Act, 1881, there must be clear dealing, express or implied, involving abandonment of such right or benefit.

Per MORRIS, C. J. :—

That “predecessor in title” in section 8, sub-section 9, L. L. (Ir.) Act, 1881, should still be construed as it was in the case of *Holt v. Harberton*.

That the interest of the landlord under section 8 is the plenary interest in the holding, save so far as the tenant establishes in diminution claims under the Acts of 1870 or 1881, and these claims constitute the tenant’s interest.

That sub-section 9, section 8, does not repeal section 4 of the Act of 1870.

That "otherwise," in sub-section 9, means a compensation not necessarily *eiusdem generis* as payment, but possibly of a totally different character from payment; and "compensated," in the same sub-section, means "indemnified from loss."

That to constitute compensation, it is not necessary there should be an active giving by the landlord; it is sufficient if there is a mere abstention by the landlord from enforcing his legal rights.

Per PALLES, C.B. :—

The tenant, by entitling himself to hold on for fifteen years, postpones for that or a longer period the quitting upon which he would be entitled under the Act of 1870 to claim compensation for improvements, but he does not thereby lose his *interest* in the improvements. The improvements referred to in section 8, sub-section 9, are identical with those in the 7th section. The improvements in which the tenant has an "interest" under this sub-section include those made by his predecessors in title in the wider sense.

That the interest of the landlord is the interest he has at the time the rent is being ascertained, before the tenant acquires his statutory term; and as some improvements had under section 4 of the Act of 1870 become part of the holding, without liability upon the landlord to pay compensation for them, if he were not allowed rent in respect of these improvements, it would be a transfer of the landlord's property in these improvements; and of an intention to make such transfer there is no indication in the Act.

That the effect of the Act of 1881 is to prevent the determination of an old tenancy, such as that before the lease of 1846, and the acceptance of such a lease from depriving the tenant of that right to compensation which he would be entitled to on quitting his holding under the Act of 1870; if the lease had not intervened.

That the 7th section does not limit the new tenancy (the acceptance of which is not *per se* to extinguish the tenant's right) to a tenancy at the same rent, for the same terms or upon the same conditions as the old; but the new tenancy must include part of the old holding.

That to extinguish the tenant's claim on the creation of a new tenancy there must be a contract, and its existence is a question of fact, and that the only two circumstances which the Court had before it, the determination of one tenancy and the acceptance of another, were insufficient in themselves to exclude the tenant's claim for prior improvements.

Per DEASY, L.J. :—

That, according to the decision in *Holt v. Harborton*, at the time of the passing of the Act of 1881 the house built in 1844 was the landlord's property; and in that Act there is nothing to transfer it from the landlord to the tenant.

That "predecessors in title," in section 7, only applies to the case of a tenant quitting his holding.

That it is matter of opinion in each case for the Commissioners whether the tenant or his predecessors have been compensated; and it is impossible to lay down any rule as to the elements which should enter into the formation of the Commissioners' opinion as to what is compensation.

Per FITZ GIBBON, L.J.:—

That in construing sub-section 9, section 8, L. L. (Ir.) Act, 1881, it is impossible to ascertain the respective interests of landlord and tenant, while a tenancy continues, upon any other principles than those regulating them if the tenant quit his holding, or consistently to divorce the elements of fair rent from those of compensation.

That "tenant," in the Acts of 1870 and 1881, means not merely the same person, but one who at the different periods in question fulfils the character of tenant of the same holding, under such a title as the Acts deem continuous.

That "compensation" includes any form of compensation out of the landlord's property, and it need not be a matter of contract express or implied; whether there has been compensation is matter for the opinion of the Court.

That, as regards the lease, upon the facts stated there was an inference to be drawn of facts which amounted to the creation of a new tenancy in freshly defined subjects-matter, and of a new relation between the parties.

That the determination of a fair rent is such a question as should be decided by a Court of Appeal; there should be a re-hearing, and the Commissioners should exercise their independent judgment in determining a fair rent.

CASE STATED by the Court of the Land Commission. The case was as follows:—

On the 17th of October, 1881, the tenant in this case served the landlord with an originating notice of an application to the Court of the Land Commission to fix a fair rent for his holding; we refer to this notice, which bears date the 14th of October, 1881. It describes the lands as the lands of Kildowney, in the county of Antrim, and Poor Law union of Ballymena. The other particulars as to the holding stated in the originating notice are as follows:—

Area in statute measure, . . .	42A.	1R.	5P.
Rent of Holding,	£36	10s.	0d.
Gross Poor Law Valuation, . .	£24	10s.	0d.

2. The application came on to be heard before a Sub-Commission sitting at Ballymena, and duly delegated and authorised

to decide the case. The Sub-Commission made an order bearing date the 19th day of November, 1881, to which we refer, fixing the judicial rent at the sum of £30 15s. 0d., and directing the landlord to pay to the tenant the costs of the case.

3. By notice bearing date the 2nd of December, 1881, to which we refer, the landlord stated he was aggrieved by the above order, and required the case to be re-heard before the three Land Commissioners sitting together.

Accordingly the case was re-heard before us, the three Land Commissioners, sitting together in Belfast on the 9th day of January, 1812, and we by our order, to which we refer, varied the order of the Sub-Commissioners so far as regards costs, directing that the parties respectively should abide their own costs of the hearing, but affirmed the order of the Sub-Commission as regards the judicial rent of £30 15s. 0d., and directed that the parties respectively should bear their own costs. The facts are as follows:—

In and prior to the year 1842, the greater portion of the holding in this case, consisting of 20A. 2R. 21P. Irish plantation measure, equivalent to 33A. 1R. 25P. statute measure, or thereabouts, was in the occupation of a tenant named James M'Kee, who held them as tenant under the Earl of Mountcashel, but at what rent does not appear.

In the year 1842, the Earl of Mountcashel caused the lands to be valued. They were valued accordingly by valuers appointed by him, at the yearly sum of £26 11s. 6d. From the time of the valuation the rent £26 11s. 6d. was paid by James M'Kee for said 20A. 2R. 21P., Irish, for the term of thirty years from the 1st November, 1845, at the yearly rent of £26 11s. 6d. We refer to this lease, which was given in evidence. James M'Kee built a house on the holding, using in some degree for that purpose the materials of an older house previously existing. It did not appear clearly from the evidence at what time M'Kee erected the house. By consent and admission of the parties, we state that the house was built two years before the existence of the lease; but the agent appears verbally to have offered a lease prior to the building, and M'Kee understood that he could have a lease if he liked. No improvements other than

the building of the house were alleged to have been made prior to the execution of the lease.

By deed dated October, 1846, in consideration of the sum of £240, James M'Kee granted and assigned all his estate and interest in the premises comprised in the lease to John Adams, the father of David Adams the present tenant. We refer to this assignment.

John Adams died about thirteen years ago, and on his death the holding devolved on David Adams. It did not appear in what legal manner the holding so devolved; but no question was raised on this point, and it was admitted that all the estate and interest of John Adams in the holding became upon his death legally vested in David Adams.

By deed of conveyance of 30th April, 1857, the Commissioners of Incumbered Estates in Ireland conveyed to William Dunseath, deceased, the husband of the above-named Jane Dunseath, his heirs and assigns, the lands of Kildowney, subject amongst other tenancies to the tenancy created by the said lease of the 2nd March, 1846. There is another lease of the same date and between the same parties mentioned in the schedule to the conveyance, comprising between five and six statute acres; but this case is not conversant with the latter lease.

William Dunseath died in the year 1869, and upon his death all his estate and interest in the lands of Kildowney became vested in Jane Dunseath.

John Adams erected buildings upon the lands in addition to those previously existing. The buildings so erected by John Adams consisted of a boiling-house and shed. John Adams also effected improvements by reclamation of waste lands, by making fences and drains and a farm road.

After the death of John Adams, and during the currency of the lease, David Adams effected improvements on the lands by reclamation of waste lands, and by making fences and drains.

David Adams, from time to time during the currency of the lease, took as tenant from year to year under Mrs. Dunseath certain pieces of bog, amounting together to about nine acres, statute measure, at rents amounting in the aggregate to £4 10s.

He was in possession of these pieces of bog at the termination of the lease. He also effected improvements by reclamation of a portion of these pieces of bog.

The lease expired on the 1st of November, 1875. After its expiration Mrs. Dunseath caused the premises comprised in it to be re-valued, with a view to the re-adjustment of the rent.

They were accordingly re-valued at the annual rent of £31 17s. 6d. The valuer was Mr. Raphael, who had taken part in the previous valuation of 1842, and he was examined as a witness before us. He stated that in valuing the land he took no improvements into consideration, but kept the improvements out.

The sum of £31 17s. 6d. thus ascertained, and the annual sum of £4 10s., paid for the pieces, made together £36 7s. 6d., which rent accordingly was paid from the 1st November, 1875.

We do not think it necessary to state the conflicting evidence as to the value, inasmuch as this case is conversant solely with questions of law.

Mr. Holmes, on the conclusion of this and some other cases of Mrs. Dunseath's, which were also re-heard before us, submitted to us in writing certain requisitions in point of law, to which we refer. The case therein mentioned as No. 1 is the case of David Adams tenant, Jane Dunseath landlord, with which we are now dealing.

As applied to the present case, his contentions were: [These contentions will be found fully stated in the judgment of THE LORD CHANCELLOR at p. 145]. We declined to accede to the requisitions of Mr. Holmes, or to any of them; but on his application we agreed to state the present case for consideration and decision of Her Majesty's COURT OF APPEAL in Ireland.

The questions submitted for such consideration and decision are—

1. Whether in fixing a fair rent for the holding, the landlord should be allowed rent in respect of all improvements made previous to the expiration of the lease of the 2nd March, 1846?

2. Whether in fixing such fair rent the landlord should be allowed rent in respect of all improvements made during the

currency of the lease, except those made by the present tenant himself?

3. Whether in fixing such fair rent the landlord should be allowed any rent in respect of all improvements made prior to the making of the lease of 2nd March, 1846?

4. Whether in fixing such fair rent the landlord should be allowed any rent in respect of improvements made during the currency of the lease of 2nd March, 1846, on the ground that under the 1st clause of the 9th section of the Landlord & Tenant (Ireland) Act, 1870, some deductions must be made in ascertaining the tenant's interest in such improvements from the value thereof?

5. Whether in fixing such fair rent the landlord should be allowed some rent in respect of improvements made during the currency of the lease, on the ground that the tenant by holding under lease has been (if not altogether) to some extent compensated for his improvements?

The following documents were in evidence:—Originating notice to fix a fair rent; order of the Sub-Commission thereon; notice of appeal to the Land Commission; order thereon dated January, 1882; the lease of 1846; the assignment of same of October, 1846; the Incumbered Estates Court conveyance of 30th April, 1851, to William Dunseath; the requisitions of counsel for the landlord.

The Mac Dermot, Q. C., Holmes, Q. C., and Orr, for the Landlord.

Serjeant Hemphill, Q. C., Piers White, Q. C., and Dodd, for the Tenant.

Cur. adv. vult.

LAW, C. :—

THIS is a case stated by the Land Commission in respect of certain questions of law arising in a proceeding before it for fixing the fair rent of a tenant's holding, under the 8th section of the Land Law (Ireland) Act, 1881.

The facts of the case as stated by the Land Commission are as follows :—

The holding consists of about 42 acres of the lands of Kil-

downey, in the county of Antrim, originally part of the estate of Lord Mountcashel, but now by purchase and subsequent devolution become the property of a Mrs. Dunseath.

In 1842, some 33 acres, statute measure, of the present farm were held by one James M'Kee, but how or at what rent does not appear. In that year, however (1842), Lord Mountcashel had the lands re-valued, and the rent fixed at £26 11s. 6d., which rent was thenceforward paid by the tenant. It is stated that a lease was verbally promised to M'Kee; and accordingly, on the 2nd March, 1846, a lease was executed to him of his farm, at the rent already arranged in 1842; similar leases being executed on the same day to nine other tenants on this same townland, all alike for the same term of thirty years from the 1st November, 1845.

In the interim, however, between the re-valuation or arrangement of the new rent in 1842 and the actual execution of the lease on the 2nd March, 1846, M'Kee re-built the dwelling-house: and this particular "improvement" raises one of the questions in the present case.

M'Kee, having got the lease in March, sold the farm to John Adams in the following October for £240, the assignment being dated the 27th October, 1846.

John Adams, having thus bought the farm, proceeded to make further improvements thereon. He erected certain buildings, reclaimed waste land, made fences and drains, and also a farm road. He died about the year 1869, and the farm then vested in his son David Adams, the present tenant.

Meanwhile, in the year 1851, the Mountcashel estate was sold by the Commissioners for the Sale of Incumbered Estates, and the townland of Kildowney being purchased by a Mr. Dunseath was conveyed to him by a deed dated the 30th April, 1851, subject, of course, to the existing leases and tenancies as specified in the schedule; turning to which we find a number of leases dated the 2nd March, 1846, and amongst them this particular lease, referred to as then vested in the representative of James M'Kee. Mr. Dunseath died in 1869, and the property so purchased by him thereupon vested in his widow, Mrs. Dunseath.

David Adams, who about the same time succeeded his father in the leasehold, made further improvements on the farm. These improvements consisted of reclamation, and the making of new fences and drains. He also, from time to time before the expiration of the lease, took from Mrs. Dunseath, as yearly tenant, some pieces of bog adjoining, I suppose, his leasehold, the quantity being in all about nine statute acres, and the rents amounting in the aggregate to £4 10s. Some parts of this bog land also he is stated to have reclaimed.

The lease expired on the 1st November, 1875 : and thereupon Mrs. Dunseath had the lands comprised in it re-valued, and a rent of £31 17s. 6d. assessed on it. This, added to the £4 10s., the rent of the bog, made the rent of the whole amount to £36 7s. 6d., which the tenant has hitherto paid accordingly, but now seeks to have reduced, as not being a fair rent under all the circumstances of the case.

The case was heard by three Assistant Commissioners, who, by their order of the 19th of November, 1881, determined that the fair rent of the holding was £30 15s. From this decision both tenant and landlord appealed to the Land Commission itself, who reheard the case on the 9th of January. On the occasion of this rehearing, Mr. Holmes, as counsel for the landlord, submitted certain requisitions to the Commission, calling on them to decide as matters of law :—

“ 1. That the landlord is entitled to rent in respect of all improvements made previous to the expiration on the 1st of November, 1875, of the lease of 1846, inasmuch as such improvements were not made by the tenant or his predecessor in title ; or, if the Court should refuse to act on this view, then,

“ 2. That the landlord is entitled to rent in respect of all improvements made during the currency of the lease, except those made by the present tenant himself, inasmuch as his predecessors in occupancy were not his predecessors in *title*.

“ 3. If the Court declined to accede to requisitions 1 and 2, then [α] that the landlord is entitled to rent in respect of all improvements made prior to the making of the lease of 1846 ; and [β] that the landlord is entitled to *some* rent

in respect of improvements made during the currency of the lease, on the ground that (1) under the final clause of section 4 of the Landlord and Tenant (Ireland) Act, 1870, some deduction *must* be made in ascertaining the tenant's interest in such improvements from the value thereof: and upon the further ground (2), that by holding under lease he has been, if not altogether, to some extent 'compensated' for his improvements."

The Commissioners declined to accede to these requisitions, or any of them; but on the application of Mr. Holmes, as counsel for the landlord, they agreed to state the facts of the case and submit his propositions for the consideration and decision of this Court.

The questions, accordingly, with which the present case concludes are merely Mr. Holmes' requisitions in an interrogative form. Now, however well adapted the requisitions were for their original purpose, they are exceedingly difficult, if not practically impossible, to answer clearly when thus turned into questions. Some of them propose a single legal question as applied to different states of facts; and in short any precise answer to them would require so many qualifications and distinctions, that we have thought it better on the whole to extract for ourselves and answer the purely legal questions which arise in the case as stated, leaving the Land Commission to apply our answers to the facts as they have already been, or may hereafter be, found by them.

The questions of law, then, which appear to be presented by the case are these:—

I. What is the meaning of the word "improvements" in the 9th sub-section of section 8 of the Land Law Act, 1881?

II. Has the expression "his predecessors in title," as applied to the tenant in that sub-section, the same meaning as in the 7th section of the Act?

III. Are the provisions of the final paragraph of the 4th section of the Land Act of 1870 (as to a tenant claiming compensation for improvements made before the passing of that Act) applicable to such improvements in determining what is a "fair rent" under the 8th section of the Act of 1881?

IV. Where a tenant, holding by lease, makes improvements, is enjoyment thereof by him or his successors during the residue of the lease "compensation by the landlord," within the meaning of the 9th sub-section of section 8 of the Act of 1881?

V. Does the lease of the 2nd March, 1846 (Lord Mountcashel to James M'Kee), preclude the tenant from being regarded as having any interest in respect of the improvements made (that is, the house built) before the execution of that lease, in determining what is the fair rent of the holding, under the 8th section of the Act of 1881?

We think that distinct answers to these several questions will practically solve all the legal difficulties presented by the case.

Before proceeding, however, to answer the questions, it is necessary to notice one important matter:—The case does not state that the holding of David Adams is subject to the Ulster Tenant-right custom; and therefore we must, for our purposes, assume that the tenant is not entitled to the benefit of that custom. This, indeed, is substantially implied, as well by the questions originally proposed to us, as by those which we have framed for ourselves: for the doctrine of *Holt v. Harberton* (1), and that class of cases, has never caused any difficulty with respect to an Ulster Tenant-right holding. The tenant of such a holding has always had the right to sell it as it stood, with its improvements on it, and never thought of claiming compensation for them from the landlord under section 4 of the Act of 1870. On the other hand, any landlord insisting on rent in respect of improvements made not by himself, but by the tenants for the time being, whether holding under one continuous tenancy, or under distinct successive tenancies transmitted from one tenant to another, has always, I apprehend, been dealt with as infringing on the custom by thus demanding what was unreasonable and unfair.

Our answers, therefore, to the questions in this case must not

(1) Ir. R. R. & L. App. 82.

be taken as applicable to an Ulster Tenant-right holding, but only to one subject to the general law.

The questions I shall now endeavour to answer as clearly as I can :—

As to the first, viz., the meaning of the word “improvements,” in the 9th sub-section of section 8 of the Land Law (Ireland) Act, 1881, there is, I apprehend, little room for controversy. The Act of 1881 provides (section 57) that any words or expressions not defined by that Act, but which are defined in the Land Act of 1870, shall have the same meaning as in the latter. Now the word “improvements” is not defined in the Act of 1881, but is in the Land Act of 1870. Accordingly, turning to the Act of 1870, we find it there declared (section 70) that “improvements” shall mean “(1), Any work which being executed adds to the letting value of the holding on which it is executed, and is suitable to such holding; also (2), Tillages, manures, or other like farming works, the benefit of which is unexhausted at the time of the tenant quitting his holding.” In the Act of 1881, therefore, as well as in the Act of 1870, we must interpret the word “improvements” as meaning simply suitable and ameliorative works executed or done upon the holding. Being suitable and ameliorative, they of course increase its letting value; but the works are one thing and the increased letting value another. The works executed by the tenant are wholly his, and are to be completely protected and secured against confiscation, whether by imposition of rent on them or otherwise. But so far as those works may have brought out latent powers and capacities of the land, and so increased its letting value, that increased value does not necessarily belong to the tenant. I say necessarily, because whilst there are many cases in which the increased yearly value would be no more than a fair return for the tenant’s outlay in effecting the improvement, as in the case of permanent buildings, and in many kinds of reclamation, there may still be cases (as mentioned by Mr. Butt in his Treatise on the Act of 1870, at p. 128), in which the increase of yearly value is so greatly in excess of the most liberal allowance to the tenant in respect of his improvement-works that the landlord, in the

ascertainment of a fair rent, is justly entitled to have some share of that increased yearly value. In my opinion, therefore, the negative provision contained in sub-section 9 of the fair rent clause (section 8) of the Act of 1881, that "No rent shall be allowed or made payable in respect of tenants' improvements," secures against the imposition of any rent only the improvement-works, that is, their yearly value, leaving any increased yearly value beyond that to be dealt with under the earlier part of section 8, as may under all the circumstances of the case be considered just and fair between the parties. For it should be observed that though the absolute prohibition of charging rent contained in this 9th sub-section is thus limited, it by no means follows that rent is to be charged on all outside the scope of the prohibition. That is a matter for the Commissioners in the exercise of their discretion, and having regard to what may appear to them to be just and right.

As to the second question, that is to say, What is the meaning of the expression "tenant, or his predecessor in title" as used in the 9th sub-section, I concur with Mr. Justice O'Hagan in holding that its meaning is the same there as in the preceding section 7. That section plainly was inserted to remedy the mischief and injustice often caused by the strict interpretation of those words, which required not merely that one tenant should derive title from another, but that the title or tenancy itself should remain identically the same throughout; the necessary consequence being that on any change whatever of the tenancy, the tenant's property in his improvements, whether made by himself or by those from whom he derived his original interest, was, in effect, transferred to the landlord, without any consideration being given for it, and in fact without any such result being contemplated or desired by either party.

The 7th section of the Act of 1881 removes this technical objection to a tenant's claim to compensation for improvements made before the supposed change in the tenancy, leaving it to the Court, in adjudicating on the claim, to take into consideration all the circumstances under which the change of tenancy or tenants took place, and admit, reduce, or disallow the claim, as

it may deem just. * This is the substantial effect of the clause. But for our present purpose it is even more important to observe the language by which this is done. [His LORDSHIP here read the 1st paragraph of section 7.] It will thus be seen that the preceding tenants who are supposed to have made improvements under determined and extinct tenancies are called by the statute "the predecessors in *title*" of the actual tenant, holding by a new tenancy since created. The expression, therefore, being used to describe these preceding tenants who held not by the now existing title, but by other titles since determined, and replaced by the new title of the actual tenant, it is manifest that in this section the old, strict, technical interpretation, requiring the "predecessor in title" to be predecessor in the *same* title, must be rejected, and the expression be taken to be here used by the legislature in a less technical and wider sense, as simply denoting a series of tenants who have transmitted from one to the other their respective tenancies or titles to the possession of a holding, whatever those tenancies or titles may be, or whatever changes they may have undergone. So that the legislature not only remedies the evil caused by the former technical and strict construction of the expression in the 4th and 6th sections of the Act of 1870, but itself gives an illustration of how it means the expression to be interpreted, at all events in this Act of 1881, by using the words predecessors *in title* to describe a line of tenants preceding each other in the same farm, though by different titles or tenancies.

Such then being the plainly declared meaning of the expression "predecessors in title" in this 7th section, it follows, I think, according to the well-settled rules of interpretation, that we ought to regard it as having the same meaning in the few other places where it occurs in this statute. "It is a sound rule of construction," to borrow the language of one of the Judges of the English Court of Exchequer in *Courtauld v. Legh* (1) "to give the same meaning to the same words occurring in different parts of an Act of Parliament or other document." "I do not consider," says Lord J. Turner, in *Re National Savings Banks*

(1) L. R. 4 Ex. 130.

Association (1) “that it would be at all consistent with the law, or with the course of the Court, to put a different construction upon the same word in different parts of an Act of Parliament, without finding some very clear reason for doing so.” “We disclaim altogether,” says Lord Denman (*Reg. v. Poor Law Commissioners* (2)) “the assumption of any right to assign different meanings to the same words in an Act of Parliament, on the ground of a supposed general intention in the Act. We find it necessary to give a fair and reasonable construction to the language used by the legislature; but we are not to assume the unwarrantable liberty of varying that construction for the purpose of making the Act consistent with any views of our own.”

Now it is to be observed that throughout this long statute, consisting of 62 sections, the expression “predecessors in title” occurs in only six places, and that in all but one of these it is used in connexion with the ownership of “improvements” on a holding, and nothing else. It occurs twice in the 1st section, which gives the general right of sale; viz., in the 6th and 8th sub-sections. It is used as we have seen in the 7th section, and it is used again in the 8th (or fair rent) section, viz., in sub-sections 4, 9, and 10, and in all alike, as I have said, except the last, in a similar connexion. Why then is it not to be understood in the same untechnical and popular sense throughout? and especially why are we to interpret it in the 9th sub-section of the 8th clause differently from what we necessarily do in the preceding section, both of which are plainly intended to secure the tenant’s interest in his improvements? It appears to me that not only would this be to act in disregard of the settled rules of construction to which I have referred, but also contrary to the plain object of this enactment, and the simple justice of the case. The tenant’s right to improvements, whether made by himself, or purchased or otherwise acquired by him, being admittedly preserved and secured by the 7th section, notwithstanding any such change of tenancy or tenants as there de-

(1) 1 Ch. App. 549.]

(2) 6 Ad. & E. 68.

scribed, it seems but a mere corollary to provide that this right shall not be eaten away by any imposition of rent on those improvements. Besides, for the purposes of this sub-section, what distinction can be fairly made between the case of improvements transmitted through a series of "predecessors in the same title," and those transmitted through "predecessors in different titles," but secured to the present tenant by section 7?

But there are, as it appears to me, other and strong reasons for reading the words in their untechnical and popular sense. In whatever way we interpret them as applied to the tenant, we must, I apprehend, interpret them in a similar way as applied to the landlord. If the words in the tenant's case include only those who preceded him in his present estate or tenancy, how can a deceased landlord tenant for life be, with any propriety or consistency, regarded as the predecessor *in title* of the remainderman? Or take the case of a property settled, as is very generally the case, subject to a mortgage. The tenant for life of the equity of redemption being in possession, pays the occupying tenant for his improvements, and dies. The mortgagee then forecloses the equity of redemption and sells through the Court, or sells under his power of sale. Is the purchaser entitled to treat the equitable tenant for life, who paid for the improvements, but whose estate is since determined, as his predecessor in title? How can he be so, if we insist on the old technical interpretation of the same words as applied to the tenant in the previous line of the same sub-section? Again, let us turn to one of the earlier places in which we find this expression. Sub-section 8 of the first clause makes provision for cases in which permanent improvements have been made by the landlord or his predecessors in title (solely or by him or them) jointly with the tenant or his predecessors in title. Now, suppose a landlord tenant for life of a settled estate, and his tenant lessee for years, join in executing some permanent improvement on the holding. The landlord tenant for life dies. The tenant's lease expires; but the landlord's successor, seeing the tenant an industrious and thriving man, lets him remain on in his holding as before, or perhaps gives him an additional piece of land,

throwing all into one tenancy, at, of course, an increased rent. The tenant then dies, leaving the farm and everything on it to his son, who proceeds to sell. Assuming the sub-section to be brought into operation, and all interests in the improvements to be sold, is the landlord remainderman to be held entitled to their entire proceeds, on the ground that the deceased tenant for life, who joined the then occupying tenant in making the improvements, was *his*, the remainderman's, predecessor, but that the occupying tenant who joined that tenant for life in making them was not the predecessor of his son to whom he left the farm? Surely, we cannot rightly construe an Act of Parliament in this fashion. All these difficulties, however—and more might be suggested—will be at once avoided if we take the expression “predecessor in title” as applied to both tenant and landlord alike, to be used in an untechnical and popular sense, as not necessarily involving the idea of one single estate continuing unbroken and undetermined, throughout the whole line of succession, but as denoting in one case the substantial devolution of title to the reversion, and in the other the substantial devolution of title to the possession from predecessor to successor. These, however, I refer to only as subsidiary or confirmatory arguments. I base my decision mainly on the implied declaration of the legislature in the 7th section of this statute, that it uses the expression not in the sense in which it was interpreted in *Holt v. Harborton* (1), and other cases, but in the untechnical and wider sense I have indicated; and having thus once ascertained the meaning of the expression from the Act itself, I read it in the same sense throughout: in the 1st and 8th sections, as well as in the 7th—doing so all the more readily because I thus have the satisfaction of knowing that such construction renders the Act consistent with itself and with justice, and that at all events I am not interpreting the same words, when repeated in the same clause, as meaning one thing for the landlord, and another for the tenant.

As to the 3rd question, viz., whether the provisions of the

(1) Ir. R. R. & L. App. 82.

final paragraph of the 4th section of the Act of 1870, as to a tenant claiming compensation for improvements made before the Act are now applicable in determining what is a "fair rent" under the 8th section of the Act of 1881, I am of opinion that they are not so applicable, and that on two grounds. In the first place, it appears to me that to treat these provisions as applicable to this process of fixing a fair rent, and allow to the landlord any rent in respect of improvements made by the tenant before the 1st of August, 1870, is directly and explicitly prohibited by the 9th sub-section of the 8th clause. It is said that, in having regard to the interests of the landlord and tenant respectively, as directed by the 1st sub-section of the clause, the landlord should be credited with the abatement from the actual present value of these improvements, to which the tenant would have to submit, if he were proceeding against the landlord under the 4th section of the Act of 1870. But this is not a proceeding under that enactment; and, moreover, this general direction that the Court, in fixing fair rent, shall have "regard to the interest of the landlord and tenant respectively, and consider all the circumstances of the case," is, it seems to me, designedly controlled and explained by the specific provision of the 9th sub-section, which enacts that no rent shall be allowed or made payable in respect of any improvements whatever belonging to the tenant. If it had been intended that some rent might be allowed in respect of improvements made before the passing of the Act of 1870, there would certainly have been an exception or qualification to that effect introduced into this sweeping prohibition. Expressed, however, as it is, I find it impossible to give it any construction which would allow of rent being charged in respect of these any more than other improvements. But there is another reason also which weighs with me. I have already observed, when referring to the case of an Ulster Tenant-right holding, that the Ulster tenant with his custom had nothing to do with the 4th section of the Act of 1870, or any of its qualifications. His right was to sell his holding, improvements and all, and that for his own absolute use. It was never, as

far as I know, contended with respect to such a holding, that the landlord could fairly ask for increased rent in respect of improvements made before 1870, and subsequently enjoyed, on the ground that if the tenant had been claiming compensation from him under section 4 of the Act of 1870 (which he never did); the landlord could have insisted on having some abatement from the real value of those improvements, because of the tenant's enjoyment of them. Now, it appears to me that by the 1st clause of the Act of 1881, all tenants throughout Ireland are in this respect placed in practically the same position as the Ulster tenant. By that clause it is enacted that "the tenant for the time being of every holding may sell his tenancy for the best price that can be got for the same;" that is, may sell his tenancy as it stands, improvements included, insisting on the landlord accepting the purchaser as tenant, if not open to any reasonable objection, and put the purchase-money into his pocket. The landlord, indeed, has a right of pre-emption, just as in Ulster; but he has no right to get the tenancy for less than its real value. If he cannot agree with the tenant as to the price, he must pay "such sum as may be ascertained by the Court to be the true value thereof." That is to say, if the landlord wants the holding, he must pay for it what it would *bonâ fide* bring in the open market, if sold to an unobjectionable purchaser. He has no right to get it for less than this, for if so he would get it for less than its value, and the enactment is that he shall pay the "true value thereof." It cannot, I think, be maintained that in ascertaining the price which in such case the landlord is to pay, he is to be credited in reduction of the "true value" of the tenancy with an abatement in respect of the enjoyment of improvements made before 1870, such as he would be entitled to if the tenant were claiming compensation from him under section 4 of the Act of 1870. Besides that, this would be forcing the tenant to take less than the "true value" of his tenancy, which the Act of 1881 says he is to have, it would also, I think, be inconsistent with the 11th sub-section, which broadly distinguishes between these two rights, viz., the right of sale and the right to claim compensation for improvements; and, as it seems to me, forbids

their being thus confounded or mixed up together. [Reads sub-section 11.] It would be rather hard, I venture to think, upon the tenant thus selling his tenancy, forcibly to debit him in favour of the landlord-purchaser with an abatement from its "true value," as if he were merely claiming for his improvements under the Act of 1870, when this same free sale section declares that on such occasion he shall not be entitled to make any claim for compensation at all; the plain reason being that, by exercising his right of sale he is getting paid for his improvements, as included in the price of the tenancy. For just as by the Act of 1870 the Ulster tenant, claiming the benefit of his custom under section 1, and thereby getting payment for his improvements, as included in the value of his tenancy, is expressly debarred from claiming compensation under section 4 of the Act; so now by the 1st clause of the Act of 1881, a tenant availing himself of the new right of sale thus conferred upon him is for the same reason precluded from making a separate claim to be paid compensation for his improvements.

It will be observed, too, that this view does not in the least interfere with the right of the landlord to have a "fair rent" fixed for the holding. Whether in Ulster or elsewhere, the sale of the tenancy is subject to this right, which the purchaser of course takes [into account. But when the question of what is a fair rent comes to be determined, and the present intrinsic value of the tenant's "improvement-works" is ascertained, it appears to me that, in estimating the tenant's interest in his holding, he should be credited with the entire of the present value of his "improvement-works" so ascertained, whether those works were executed before or since the 1st of August, 1870; because this is no more than what he would get by selling the tenancy as he may with those "improvement-works" upon it; and that the landlord is not entitled to have any part of this actual present value of those works struck off or credited to him as against the tenant's enjoyment of them; as might have been the case if the tenant had had no right of sale, and no power of thereby getting the full market value of those

“improvement-works,” but had been limited to a mere claim of compensation from the landlord under the 4th section of the Act of 1870, with all its exceptions and qualifications. For the right thus conferred by the Act of 1881 enables the tenant, I apprehend, to realise the full present value of his improvements, even though they be of a class for which, if he were quitting, he could not claim compensation from the landlord under section 4 of the Act of 1870. At all events it must, I think, be admitted that when the tenant sells he will get back the then fair market value of the improvements, wholly irrespective of whether they were made before or after the 1st of August, 1870, and without any reference to his enjoyment of them, save so far as this may possibly be represented by their deterioration, which is, of course, taken into account in arriving at their existing value. It seems, therefore, to me to be a fallacy to disregard and ignore this new right conferred on the tenant by the Act of 1881, and to estimate his interest in his holding as if it had no existence. Just as the Ulster tenant never resorted to a claim for compensation under the 4th section of the Act of 1870 (or the 3rd), unless he had lost his right to sell the tenancy in the open market, so now, I apprehend, no tenant in Ireland will, except under some peculiar circumstances, make any claim upon his landlord to be paid for his improvements under the Act of 1870, but will sell his tenancy improved as it stands, and thus get, as included in the price, whatever is the fair present value of his improvements. Accordingly, it seems to me that, even putting out of consideration the 9th sub-section of clause 8, with its express prohibition of charging any rent whatever for improvements, we ought, in estimating the “interest of the tenant” under the general words of the beginning of the 8th (or fair rent) clause, to take into account not merely his old right to claim compensation from his landlord under the 4th section of the Act of 1870, but also his much larger right, viz., the right to sell his tenancy as it stands, improvements and all, as the statute says, “for the best price that can be got for the same.” In other words, I think the tenant’s interest is to be measured by the maximum and not by the minimum of his rights.

For these reasons, I think no rent should be allowed or made payable in respect of improvements, whether made before the 1st of August, 1870, or after that date.

As to the 4th question, viz., when a tenant holding by lease makes improvements and enjoys them till the end of his lease, can such enjoyment be deemed "compensation by the landlord" within the meaning of the 9th sub-section of section 8 of the Act of 1881? This question, I think, almost answers itself. What in such a case has the tenant got from the landlord for his improvements? Simply nothing. The lessee purchased from the landlord for a certain term the possession and use of the land with all its capacities of improvement. For this he pays the stipulated price, viz., the yearly rent. Whether he executes improvements or not, he has a right to hold the land for the term; and so long as he pays the instalments of his purchase-money, known in this case as rent, the landlord cannot interfere with him. The right to hold for the term was thus purchased before the improvements are supposed to have been made, and how the enjoyment of that right for which the tenant pays the stipulated price, and to which he is alike entitled whether he makes improvements or not, can be regarded as not only compensation for those improvements, but also compensation for them by the landlord, is, I confess, beyond my comprehension. This question, therefore, as between lessor and lessee, with which alone we are here concerned, must, I think, be answered in the negative.

Lastly, I come to the 5th question, as to the effect of the lease of the 2nd March, 1846, of itself to preclude the tenant from being regarded as having any interest in the house built before its execution. In my opinion, there is nothing in this instrument to bar the tenant's claim in that respect. It is, no doubt, a demise of all the farm or parcel of land, "together with all houses, edifices, and buildings, and appurtenances thereunto belonging"; but so, in effect, is every demise, whether by instrument under seal or by mere word of mouth. That it was a new letting is, of course, admitted; but whether it made mention of "houses" or demised the land simply, which would

carry the houses and everything else upon it, seems to me wholly unimportant; the maxim being that *expressio eorum quae tacite insunt nihil operatur*. Unless the buildings were to be excepted out of the demise and taken from the tenant, they must be demised to him, and whether they be so demised *nominatim*, or as included in the word *land*, is not, in my opinion, of the least importance. The same objection would lie to every case in which an improving tenant had bought an adjoining holding with the consent of his landlord, and united both farms into one holding at a single rent. This, as it seems to me, is simply the technical objection which was meant to be met, and as I think has been effectually met, by the 7th section of the Act of 1881. The mere surrender of a prior tenancy from year to year, and acceptance of the new tenancy, without anything more, is not, the statute says, to prejudice the tenant's right in respect of improvements made under the surrendered tenancy. Whether the transaction ought to be differently viewed depends now on its substance, not, as before, upon its mere form; and in this case if the Court, after due investigation and full consideration of all the circumstances under which this particular change of tenancy took place, came to the conclusion that the lease was in fact given in consideration of and as compensation for the building of the new dwelling-house, then of course the present tenant should not be regarded as having any claim in respect of it, or as entitled to object to rent being allowed for it. This, however, is a matter of fact for the Commission to deal with, and not one of law, on which we can pronounce any definite opinion beyond this—that there is nothing in the lease, as I conceive, to exclude the application of section 7 to the house built before its execution.

It may be suggested that the land being here demised “with all houses, &c., thereunto belonging,” the demise in that form amounts to an express exclusion of the right to compensation in respect of such houses, within the 2nd proviso subjoined to section 4 of the Land Act, 1870, which bars the tenant's right to compensation for any improvement “his right to which compensation is expressly excluded by such lease or contract.” But

this view cannot, I think, be maintained. From the year 1845, when the Devon Commission recommended that a measure should be passed giving tenants a right to claim compensation for their improvements, it was plain that this reform was certain to be sooner or later adopted. Lord Derby proposed it in 1847, Sir Joseph Napier proposed it in 1852, and almost every Session of Parliament up to 1870 saw similar enactments attempted. Under these circumstances it became by no means unusual for landlords to insert in their leases covenants expressly providing that no such claim should under any circumstances be admissible; (an example of which, if desired, may be seen in the reported case of *Stevenson v. Leitrim* (1)); and it was to meet cases of this kind, in which leases or written contracts of tenancy had been previously made, containing clauses expressly excluding any claim to compensation for improvements, that the proviso in question was inserted in the 4th section of the Act of 1870. Besides this, the mere demise of the farm with all houses, &c., on it cannot, I apprehend, be fairly construed as an express exclusion of the right to compensation for those houses; especially when we remember that even an express covenant to give up the holding at the end of the term, with all houses, buildings, &c., thereon, does not amount to an express exclusion of the right to compensation within the meaning of this exception.

On the whole, therefore, I am of opinion that the lease of 1846 of itself does not preclude the tenant's claim to compensation in respect of the house built before its execution, and therefore that the landlord is not necessarily entitled to rent in respect of it. Whether he is so or not depends, I think, on what the Land Commission may find to have been the substance of the transaction of the 2nd March, 1846, and the change of tenancy which then took place.

(1) 1r. R. R. & L. A. App. 121.

MAY, C. J. :—

As to the meaning of the word “improvement,” used in the 9th sub-section to the 8th section of the Act of 1881, I think it clear that the definition in the Act of 1870 must be followed, and the word must be taken to mean an actual work executed at a definite period of time, not any increased value subsequently accruing to the lands in consequence of the execution of such work.

The term being impressed with this definite meaning, it seems to me that the operation of this 9th sub-section will be confined within somewhat narrow limits. The sub-section enacts that no rent shall be allowed or payable in respect of any improvement created by the tenant or his predecessors in title. In the case of the erection of a house, or any structure having an existence separate from the lands, this language is of easy application, and seems simply to mean that the holding shall be valued irrespective of such structure.

But in the case of drains and other works of reclamation or improvement of that nature, it would seem that the language of the sub-section is not appropriate. It seems that rent could hardly be claimed in respect of a drain, or in respect of an embankment made for the purpose of reclamation, or any similar work. The improvement work in such cases possesses in itself little or no annual value, and the increased value which it may confer on the adjoining land is not an improvement in its statutory sense; nor does it appear to me that the expenditure of money or labour in the construction of such a work can be regarded as an “improvement;” such expenditure or labour could not be registered under the 6th section of the Act of 1870. It appears to me that improvements of this class do not fall within the operation of this 9th sub-section; but this result would not be prejudicial to the tenant. Such expenditure would, I think, constitute one of the circumstances of the case to be considered by the Commissioners in fixing a fair rent. But in what manner such a circumstance should be had regard to, or by what process the rights or interests of the landlord and tenant respect-

ively in the holding should be ascertained, is not, I think, a matter of law on which this Court is called upon to express any opinion—rather a matter of valuation to be entertained by an intelligent tribunal.

As to the meaning of the term “predecessor in title,” I consider this Court and every member of it is bound by the decision of the Court in *Holt v. Harberton* (1). But independently of the conclusive authority of that case, it seems to me plain that in the Act of 1881 this term does not mean an antecedent occupier, but a previous tenant from whom the existing tenant derives his title to his tenancy.

Any other construction might operate to the prejudice of the existing tenant. Thus, when under the 3rd and 4th sections of the Act of 1870 it is provided that from moneys payable to a tenant for disturbance, or by way of compensation for improvements, there shall be deducted all sums due to the landlord from the tenants or his predecessors in title for arrears of rent, or for damages for deterioration of the holding, these enactments cannot apply to all previous occupiers, some of whose interests may have been determined by notice to quit, or by eviction for non-payment of rent, but must be limited to persons from whom the tenant derives his title and interest; otherwise the compensation payable to the tenant might be absorbed in liquidating the obligations of prior insolvent occupiers.

But it is contended that the 7th section of the Act of 1881 has had the effect of enlarging the meaning of the term when used in the later Act, therefore also I presume in the Act of 1870, as the Acts are to be read as one Act. This 7th section of the Act of 1881 is the last clause in the first part of the Act, and is headed “Amendment of law as to compensation for improvements;” and it provides that a tenant, on quitting the holding of which he is tenant, shall not be deprived of his right to receive compensation under the Act of 1870 by reason only of the determination by surrender or otherwise of the tenancy subsisting at the time when such improvements were made by

(1) Ir. R. R. & L. App. 82.

the tenant or his predecessor in title, and the acceptance by him or them of a new tenancy.

The clause seems to me to be intended to apply to cases where a tenancy has been transmitted not by assignment in the proper sense of the word, but by a surrender of the outgoing tenant, and acceptance by the incoming tenant of the same tenancy. And this view would seem supported by the next succeeding passage as to tracing title. The clause would not apply, in my opinion, in every case of the determination of a tenancy of one tenant, and the acceptance of a new tenancy by another person—supposing lands to be evicted for non-payment of rent, or for forfeiture incurred by violation of covenants or otherwise, and the landlord to resume possession and make a new letting to another tenant, it does not seem to me that such tenant could claim compensation for improvements made by the evicted tenant as his predecessor in title. But, in my opinion, the operation of the 7th section is limited, by the express language used, to the case of a tenant who is quitting his holding and is claiming compensation for improvements, and does not apply to the case of a tenant who is not disturbed, who has no intention of quitting his holding; on the contrary his taking steps to perpetuate his tenancy, and to have his rent ascertained. It is contended that the operation of the 7th section is to be extended by construction so as to operate on the second part of the Act and change the legal meaning of the term predecessor in title, used in that second part, and particularly in the 9th sub-section of the 8th clause. Now what is the result of the 9th section? The doctrine of Common Law was well established that, subject to some exceptions, structural improvements by a tenant by which foreign matter was fixed to the freehold, subject to the interest of the tenant under his tenancy, vested in the landlord. And of course such is still the law in this country as to all lands other than those falling within the operation of these Land Acts as to town-parks, demesnes, pastures, residential villas, buildings in towns—the ancient law is unchanged. The 9th sub-section is simply intended to transfer the beneficial interest in the improvements coming within

its operation from the landlord to the tenant and his successors. The interest of the landlord is converted into a dry unprofitable reversion, and that virtually for ever.

I conceive that the old principle applies—that where a modern statute innovates and encroaches on the Common Law, such a construction of the enactment should be adopted as would confine this innovation within as narrow limits as are consistent with the giving effect to the recent Act. The Act of 1881 does not affect to give any new definition of the term “predecessor in title.” The 9th section does not do so, either expressly or by implication. That section merely provides, as I read it, that where a title to a tenancy is traced from a tenant through his predecessors in title, that is, predecessors in the proper and legal sense of the term, and a gap or solution of continuity of a particular kind is found to have taken place, the present tenant, claiming compensation for improvements on quitting his holding, shall not be prejudiced by such interruption in the regular chain of the title. I do not think that the proper meaning of this term is thereby altered. But even if it should be deemed to be so altered, for the limited purpose of that section, I will not extend this alteration to a different and separate part of the Act. I will give the legal and logical meaning to the terms of this Act of Parliament, which, so far at least as the landlords are concerned, seems to me not of a remedial nature. I will not exceed or extend that meaning. In my opinion, this term “predecessor in title” continues to bear the meaning which the case *Holt v. Harborton* (1) ascribed to it.

With respect to the operation of the final clause in the 4th section of the Act of 1870, it would seem that such deductions and allowances as are there spoken of should be considered in fixing a fair rent, so far as they can be regarded as elements of compensation by the landlord within the meaning of the 9th sub-section.

Questions of this nature involve matters of fact rather than matters of law, and can be satisfactorily determined only when

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the proper elements are submitted to the constituted tribunal. I find myself unable to form a satisfactory opinion on this point in the abstract. But it seems to me clear that improvements made during a lease cannot be deemed to be compensated by the landlord merely because they have been enjoyed during the lease. During his term the tenant is entitled to make the utmost profit out of the lands demised, including all their capabilities, consistently with the observance of his obligations as tenant; and he enjoys the benefit of his improvements not by the favour of his landlord, but in his own right as limited owner.

This case as to the house cannot, I think, be distinguished from *Holt v. Harberton* (1), which, I have already said, seems to me to be still an authority binding on this Court, notwithstanding the 7th section of the Act of 1881. Indeed this case is much stronger than *Holt v. Harberton* (1), the subject-matter of the tenancy at the termination of the lease of 1846 being changed by the addition of additional premises, and the combined holdings being let at one single rent. But supposing that *Holt v. Harberton* (1) does not apply, the case is open to a different consideration upon the question of compensation. It appears that in the year 1842 Lord Mountcashel, the then landlord, caused these premises with others to be revalued, the former leases having expired. These particular premises were valued at a rent of £26 11s. 6d. Two years before the date of the lease, the house was built, and apparently at some considerable expense; subsequently the lease was granted, in the year 1846, at a rent equal to the sum ascertained by the valuation of 1842.

It is not to be supposed that the tenant expended this money while merely a tenant from year to year, unless upon the understanding that if he built such a house he should get a lease for a considerable term of years. The landlord gave this lease for thirty years to the tenant, at a rent ascertained irrespectively of the house, and before it was contemplated. The inference, to my mind, is that the tenant built the house, reckoning that his enjoyment during this term would compensate him for the ex-

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penditure : and in any view of the case it seems to me that the lease then granted ought to be regarded as compensation wholly or partially for the house built before its commencement.

The tenant also occupied from 1875 till 1881 as tenant from year to year, and at a rent calculated irrespective of all improvements. This enjoyment also, as it seems, should have been considered on the question of compensation by the landlord. I do not consider that it should have been expressly shown that such occupation was permitted "with direct regard to the antecedent improvements, and for the purpose of compensation," to use the language of Mr. Commissioner Litton. During these years the landlord apparently permitted the tenant to enjoy these improvements free from all rent : to my view this was a benefit to the tenant, for which allowance would have been made under the final clause of the 4th section of the Act of 1880, and which should have been regarded *pro tanto* as compensation. The words of the final clause of the 4th section of the Act of 1870 are—"The Court . . . shall . . . take into consideration the time during which the tenant may have enjoyed the advantage of such improvements, also the rent at which such holding has been held, and any benefits which such tenant may have received from his landlord in consideration, *expressly or impliedly*, of the improvements so made." Further, I do not agree with Judge O'Hagan in his view of the function of the Commissioners upon an appeal from the decision of the Sub-Commissioners. This is not an appeal to a Superior Court, to be heard upon the same evidence as was before the Court below, but is a re-hearing upon which the whole case is open and fresh evidence may be adduced : and it seems to me the duty of the tribunal of appeal is to form its own independent judgment upon the evidence brought before it. The Commissioners most properly reversed the order by which the Sub-Commissioners ordered the owner to pay the tenant his costs. On what ground they made such an order is not explained : till explained, it must be regarded by all persons who have any acquaintance with judicial proceedings with astonishment.

SIR EDWARD SULLIVAN, M. R. :—

THE LORD CHANCELLOR has clearly stated the five questions of law which arise on the case stated for decision. They are all of more or less importance, as they involve matters of general application in the administration of the law under the two Land Acts of 1870 and 1881. The solution of these questions depends altogether on the correct interpretation of the language of those two statutes taken together and construed as one code.

The principles of judicial interpretation of statutes are conceded at the Bar, and we are all, I believe, entirely agreed as to those principles. The statutes must be construed according to the fair and reasonable meaning of the language used in them, and everything that such language conveys or enforces must be adopted and carried out totally independently of the policy or impolicy of the results.

As to the 1st question, my opinion is that the word “improvements” as used in the 9th sub-clause of the 8th section of the Act of 1881, must receive the same, or rather the identical, meaning it has in the Act of 1870, and in the various other parts of that Act and the Act of 1881 where the word occurs, it does not, and cannot, mean the increased letting value of the holding caused by the making of the improvements, but simply the works which have caused that increase, or rather the interest of the tenant who made them; measured by the money expended on them, as declared and limited by the two said Acts. We are not left to speculate on this matter; for the very word is the subject of express definition in the Act of 1870, the 70th section thereof defining improvements as follows:—“Any work which being executed adds to the letting value of the holding on which it is executed, and is suitable to such holding;” and the 57th section of the Act of 1881 directs that Act and the Act of 1870 to be construed together as one Act; which in itself would, I think, be sufficient to show the true meaning of the word improvement in the 9th sub-section of the 8th section of the Act of 1881: but there is an unambiguous enactment in the Act of 1881, that any words or expressions therein which are not thereby defined, and are defined in

the Act of 1870, shall, unless there be something in the context repugnant thereto, have the same meaning as in the Act of 1870, except so far as the same is expressly altered or varied, or is inconsistent therewith. The conclusion on this very important matter which seems to have been adopted by two of the learned Commissioners, Mr. Justice O'Hagan and Mr. Commissioner Litton, is, in my mind, erroneous; an interpretation of the 9th sub-section in question which would make the term improvements therein mean the whole increase of letting value involves consequences so large and startling that one testing the construction of the statutes is at once disposed to think some error must exist; for as a tenant on quitting his holding would only be entitled at the utmost to the value of the expenditure on the work that caused the increase of letting value, he, remaining in his holding and claiming to have a fair rent determined, would on such an interpretation be entitled to have awarded to him as his own property, as against the landlord, the whole increase of letting value caused by his expenditure. For instance, a tenant paying a rent of £100 a-year for his holding during his tenancy may spend £500 in executing works in the nature of permanent improvements, causing an increase of the letting value of his holding of £100 a-year at the time he quits. The utmost he could get on quitting his holding, under the Act of 1870, even as amended by the Act of 1881, would be £500, and that sum may be capable of being reduced to a lower point; while though not quitting, and a still abiding tenant, with all the advantages of the judicial term and rent, the Commissioners would have to allow to him the whole £100 a-year which has been produced by the joint aid of his money and the soil he has had in tenancy from his landlord. This, I think, cannot be. The two Acts seem to me entirely opposed to such a conclusion. I can find nothing in the statute of 1881 to show that such a change in the position of the tenant and landlord was ever contemplated; on the contrary, the sub-section itself stands strongly opposed to such a construction. By its very language, the test as to whether no rent is to be allowed in respect of improvements is whether they have or have not been paid for or

otherwise compensated by the landlord. What is the landlord to pay for or otherwise compensate? Surely not the whole increased yearly letting value added by the making of the improvements, but at the utmost the amount of money expended by the tenant in making the same. Following this up, the matter will appear still plainer. Supposing the tenant actually awarded compensation under the Act of 1870, the amount not being paid, of course he would under that Act be entitled to hold on or continue as tenant, supposing the landlord not being able to pay the compensation, the tenant comes under the Act of 1881 to have a fair rent fixed, his expenditure was say £500, causing an increased letting value of £100 a-year. The awarded compensation for improvements say was £400. What would be his position under the 9th sub-section? Is the fact that his right to compensation for improvements has already been fixed at £400 to be completely thrown aside, or does it constitute the true element for the guidance of the Commissioners? I think it plain that this is so. The 9th sub-section of section 8 of the Act of 1881, giving force to every word of it, can stand well together with the 8th section in all its parts. The mandatory duty cast thereby on the Commissioners is really one to be observed in administering the first part of the 8th section itself; and the meaning of it is this, that though the Commissioners are to consider the interests of landlord and tenant respectively, there is one thing they must do, viz., not fix any rent that is an annual sum in respect of improvements made by the tenant or his predecessors in title, not paid or otherwise compensated for by the landlord. These improvements are the very improvements he would be compensated for if he was leaving his holding, and no others—a view which, independently of the right interpretation of the two statutes as a whole, is made further manifest by the introduction of the 4th sub-section therein, enabling the Commissioners to disallow the application when the improvements had been maintained by the landlord or his predecessors in title. In the illustration I have put, the duty of the Commissioners in determining a fair rent would be not to allow to the tenant the whole increased letting value of £100

a-year, but to assess what would be a fair percentage or yearly allowance for his expenditure, checked and qualified by the consideration of what he would get on leaving his holding : and supposing they thought £400 would be the sum payable, and that a percentage of £10 or £12 per annum was to be allowed upon it, they should leave the £40 or £48 for the tenant free from any rent in respect thereof, while the remaining £60 or £52 should be dealt with by the Commissioners under the early part of the 8th section of the Act of 1881, with due regard to the interest of the landlord and tenant respectively. These figures are only used by me to illustrate my meaning. All this would be for the Commissioners, acting under the principles I have indicated, and by which, I think, they are bound.

As to the 2nd question. I agree with the opinion of THE LORD CHANCELLOR that "tenant or his predecessors in title" are to be construed as the same terms would be construed under the 7th section of the Act of 1881, amending the Act of 1870. I can satisfactorily to my mind, in the language of the two statutes throughout, discover amongst others one paramount object, namely, the preservation of the tenant's right to the value of his improvements ; and I think that a tenant on quitting his holding was to be enabled to get compensation in respect of all existing improvements made on the holding by himself or any former occupant thereof, notwithstanding any change of tenancy of the holding, no matter how caused, provided there was nothing else to bar the right to such compensation. In the Act of 1870 the term predecessor in title occurs in two important sections before section 11, the one in section 4 giving the claim for compensation for improvements, the other in section 6 giving the power of registration of improvements. It is plain that the term predecessors in title, as used in the Act of 1870, was deemed unsatisfactory without some explanation of it, inasmuch as in its strict interpretation the term would import only the same tenancy in devolution, and did not cover breaks in that devolution which involved the creation of a new tenancy, making the term predecessors in title inapplicable to

the former holder of the premises held under a new tenancy. To remedy to some extent this matter, the 11th section of the Act of 1870 was plainly passed, which undoubtedly carried the meaning of the ambiguous term a short way, as the decision in *Holt v. Harberton* (1) showed. This defective definition was largely extended by the 7th section of the Act of 1881; and by its terms it shows to me that it was meant to meet or counteract the ruling of the Court in that case of *Holt v. Harberton* (1); and there is thus by the express language of the statute a plain indication of intention that each successive occupant of a holding should be entitled to compensation for the improvements thereon made by the tenant for the time being, and that he should not be barred of such compensation by reason only of breaks or interruptions in the tenancy; in other words, that a new tenant of the holding which he got from a former occupant should have the right to compensation untouched, unless in the creation of the new tenancy this right to compensation was bargained for or lost by some arrangement. Now previously to the 11th section of the Act of 1881, the term tenant or his predecessors in title occurs in three important places, twice in the 6th sub-section of section 1, and once in the 8th sub-section of same section. Before we come to the 9th sub-section of section 8, the terms tenant or predecessors in title occur twice in the 4th sub-section of the same clause, and they occur in a remarkable juncture in the 10th sub-section. They are for the most part outside the 9th sub-section of section 8 used in reference to compensation; and this right of compensation is so clearly mixed up with the fixing of a fair rent that I am, by what I conceive to be the plain intendment of the statute as shown by its language, compelled to hold that on its true construction the right to get compensation for improvement is really the basis of the 9th sub-section of the 8th clause in the Act of 1881, and that therefore the term tenant or his predecessors in title must have the same meaning therein as is indicated by the provisions contained in section 7 of the same Act. I

(1) I. R. R. & L. App. 82.

further appears to me that predecessors in title, as applied to the landlord, is so loosely used in that sub-section and in the previous parts of the statute where the same term "landlord or his predecessors" occurs, that, independently of what I have stated, a very strong argument could be drawn therefrom so as to prevent the palpable injustice of the construction that payment for or maintenance of improvements by a tenant for life would not enure to a remainderman to whom a tenant for life would not, I think, be strictly a predecessor in title: but I prefer to rest my judgment on the provisions of the two statutes taken together, as indicating that the term in question must have the same meaning all through. It is a fixed canon of construction that a word once defined, or whose meaning is unquestionably ascertained in an instrument, must have the same meaning throughout, except the context opposes.

No doubt, an apparent difficulty occurs here, that the extension of meaning in section 7 of the Act of 1881 is by its language only applied to the case of a tenant quitting his holding; but this, I think, is removed by the consideration that the very extended right thereby given is the very right which gives the extended claim to compensation for improvements, which forms, in my opinion, the basis on which sub-section 9 can only legitimately be rested; the right of the tenant to get compensation for his improvements, and his right to be exempted from rent in respect of them, being, according to my view, almost, if not entirely, correlative. This view has, I think, a very strong argument in its favour, that it makes the construction of the two Acts throughout entirely uniform on the present point.

In reference to the third question, the very considerations I have just stated induce me to think that the positive enactments as to improvements before 1870, as mentioned in the final clause of section 4 of the Act of 1870, must still apply. The two Acts, by the express enactment in the statute of 1881, must be construed as one, that is, as one code. The provisions of the final clause in section 4 of the Act of 1870 are just as mandatory as those of sub-section 9; and in the statute of 1881 there is no declared intention of repealing it. Under such circumstances

the rule of construction is, that they must stand together if they can be reconciled. I think they can stand together, and that the exemption as to improvements in the 9th sub-section must operate on improvements made before the passing of the Act of 1870, just as they are defined by the statute of 1870, with all the qualifications attaching thereon. This view again establishes an uniformity of construction throughout, which if it rests on a sound principle of construction, as I think it does, has much to recommend its being adopted. Nothing can be more illusory than a term in a part of a code consisting of several Acts of Parliament being taken in its apparent meaning in any one section of one of the statutes, particularly in the last statute in the series. If one reads the 9th sub-section *per se*, he would at first sight be disposed to give the word improvements a very wide interpretation; but when we find in the very statute in which this word is used a peremptory direction that its meaning shall be taken as in the former Act of 1870, the rule is at once enforced that that interpretation must be abided by, the context not offering any obstacle. And when this is once determined, it seems to me to follow, as I have come to the conclusion, that the right to compensation for improvements is the true basis of the enactment in the 9th sub-section of section 8 of the Act of 1881; that the improvements mentioned in the sub-section must be taken as not merely defined in the Act of 1870, but also with the qualifications attached thereto by that statute, so far as the improvements were made before the passing of the Act of 1870. It appears to me that this view is as well sanctioned as it is strongly supported by all the cases that have arisen on the construction of statutes held to be one code or to be dealt with *in pari materia*. I need only refer to one case of *Eyre v. MacDowell* (1), one of the most remarkable, where the late Lord Chancellor Brady and Lord Justice Blackburne, in a series of decisions, by adhering to the supposed literal meaning of the 7th section of the Judgment Act of 1850, 13 & 14 Vict. c. 29, taken by itself, gave the judgment registered as a mortgage

(1) 9 H. L. Cas. 619.

force and effect against the previously unregistered deed of the judgment debtor. Now, on the language of that section, *per se*, that was apparently so; but they erroneously disregarded the circumstance that the statute was but part of a code regulating the rights of judgment creditors, and that before the statute the judgment itself, with its general lien, only affected what the debtor at the date of the judgment could dispose of, and that the new statute was only intended to affect that very interest in another way, and that therefore the registration could only affect what was so bound, and was as to that, and that alone, to stand as a registered deed for the future. The whole principle of the decision of the House of Lords, in every part of it, seems to me to apply in this very case on the point I am now dealing with. I think it right to add that I cannot agree with the reasoning of THE LORD CHANCELLOR, which relies on the right of sale conferred on the tenant by the early sections of the Act of 1881. These sections do not, in my opinion, give an absolute right of sale of all the improvements as they stand; if they did, it would seem to me to follow that the whole increased letting value caused by improvements becomes the absolute property of the tenant. The right of sale is on the express enactment a restricted one; the landlord can intervene, and then the Court must fix the true value. This value cannot be the market value, but what, having regard to the interest of landlord and tenant respectively under this code, would be the true estimate of price between *them*.

As to whether a tenant having made improvements during the currency of a lease, and enjoying them during that period, gets compensation thereby from the landlord, I am clearly of opinion that he does not. When a man takes a lease, he is a purchaser for the whole extent of the term granted, provided he fulfils his obligations under the lease. If he makes improvements which he can lawfully do under the terms of his lease, he has the same right to enjoy them during the term as to make them. He buys the right to enjoy and make use of them during the term as much as he buys the legitimate use of the land; and it is impossible to say that in such a state of facts he

is "otherwise compensated for such improvements" by a user or enjoyment while the lease lasts. The same consequences would follow under any other tenancy during which the improvements are made, and whilst it remains unaltered; on every break in the tenancy a state of things may undoubtedly occur which the Land Commissioners would have to consider, as to whether it amounted to a compensation for the improvements otherwise than by payment. This state of things may mount up to a case where the new tenancy is granted and accepted expressly in consideration of the improvements being made, and descend to a case where nothing whatever is said between the landlord and tenant on the subject; but where from the terms of the new tenancy it can and ought to be reasonably inferred that the new tenancy has been granted upon terms which fairly imply that the improvements were, either to the entire or partial extent, the moving cause to the landlord giving the new tenancy, no contract is, in my mind, in any way necessary towards getting at a "compensation otherwise than payment" under the section; much less is a threat or menace of eviction on the part of the landlord. The facts or circumstances surrounding each change of tenancy of the holding on which improvements have been made must in the end rule each case. Now, as an instance where, independently of any contract, I would regard this question of "otherwise compensated" as one which should be considered by the Commissioners, I will take this one: A tenant holds under a lease at a moderate rent; he, being an improving tenant, has executed permanent improvements within the statutes, which much enhance the letting value of the holding when the lease ends. The landlord at the end of the lease enters on the premises, and having viewed the premises, says to the tenant, "I see you have improved this holding; go on from year to year. I will let you hold at the old rent you paid under the terminated lease." The tenant so holds on—say for ten or twenty years—it seems to me that in that case, at the end of either of these periods, the Land Commissioners, in fixing a rent as between the landlord and the tenant, should take into consideration a letting so made as an

element in coming to the conclusion whether the improvements made were wholly or partially compensated for.

As to the operation of the lease of 1846, this is unquestionably a point of much practical moment. It has, of course, all the recommendation of a new and safe starting-point as between landlord and tenant ; but I must confess I cannot think that by itself it bars the tenant's claim. I see no difference between a lease describing the subject-matter of demise and the same subject-matter demised by parol, say from year to year. The statement in the lease that the house is part of the demised premises is no more than what would happen if the landlord let the holding and the tenant took it. To bar the tenant conclusively, on a change of tenancy, of his right to compensation for improvements, or of the benefit of the 9th sub-section, I think there should be clear dealing, either express or implied, involving an abandonment of such right or benefit. When this does not exist, the Land Commissioners must, I admit, carefully review the whole state of things accompanying the change of tenancy, and rule upon it. It would, of course, be of the utmost moment to get a starting-point, but this must and should be one clear and safe beyond any doubt. I would be apprehensive that a decision holding that a lease in the terms of that of 1846 was a bar to the subsequent occupant of the holding claiming compensation or the benefit of the 9th sub-section, would to a great degree involve the conclusion that each change of tenancy would bar all claim to improvements made before it, which I think it was the most decisive object of the statute to prevent. I think that in the present case there was nothing in any of the changes of tenancy to bar the claim to compensation for improvements, or the rights of the last occupying tenant in respect thereof.

Such are my answers, and the reasons for them, to the questions which we all agree are necessary to be answered, so as to determine the legal points arising on the case submitted to us. I have, perhaps, stated my reasons at too much length ; but as there is a considerable difference of opinion amongst the members of this Court, for whom I entertain supreme respect, I have thought it better to state those reasons fully.

MORRIS, C. J. :—

The learned Judicial Commissioner in his judgment states that he expects this Court may determine, in regard to important questions arising in this case, principles by which the Land Commissioners' future action should be regulated.

We do so after much consideration and lengthened conference, but I regret, in some instances, with more or less difference of opinion.

The five questions which directly arise on the case have been stated by THE LORD CHANCELLOR.

First—with respect to the word “improvements.” It appears to have been used and dealt with as of the same signification as “the increased letting value” caused by the improvements.

The word is defined in the Act of 1870 as “any work which, being executed, adds to the letting value of the holding, &c. ;” but the addition to the letting value is caused by the work plus the inherent qualities and capacity for such work of the holding—the latter is the landlord's, while the former is the tenant's.

The absence of any consideration of the inherent capacity of the soil, in the consideration of increased letting value caused by improvements or work done by the tenant, appears to pervade the judgments; it might in many cases be the most important factor, while in other cases it might not. This is well put by Mr. Butt at page 128 of his work on the Act of 1870. He says: “If, for instance, the letting value of the farm was increased by £10 a-year, . . . it may be urged that this value is created by the industry or expenditure of the tenant, and that therefore he is entitled to regard the property he has so created as his own.” But he proceeds to say: “The additional value is not the creation solely of the tenant. It is the creation partly of the expenditure and the skill of the tenant and partly of the inherent capabilities of the soil.”

Second—as to the meaning of “predecessors in title.” We are all of opinion that the distinction sought to be drawn between this case and *Holt v. Harberton* (1) by the learned

Judicial Commissioner is untenable. It was not decided on any such assumption as he appears to think, viz., "that the new lease was granted in consideration of the circumstance of the dwelling-house having been erected."

The Master of the Rolls, Lord Justice Deasy, and myself, were three of the Judges who decided *Holt v. Harberton* (1), and the ratio of the case was that "predecessor in occupancy" was not "predecessor in title."

The Judicial Commissioner refers, in support of his view of *Holt v. Harberton* (1), to the judgment of the then Lord Chief Baron, who did not concur fully in the grounds of the judgment of the other Judges—pronounced by Lord Chancellor O'Hagan—and therefore gave his own grounds; but the point of the judgment of the Court is emphasised by the judgment of the one Judge who was not satisfied to rest his judgment on the same grounds as was the judgment of the Court.

But then arises the question whether the 7th section of the Act of 1881 affects the construction of the words "predecessors in title" in section 8, sub-section 9. I am of opinion that it does not. The legal meaning of "predecessors in title" was settled by *Holt v. Harberton* (1). The meaning is not purported to be altered by section 7; but by that section it is declared that a tenant, under certain circumstances (the leading one being when quitting his holding), shall not be deprived of the right of compensation by reason of certain other circumstances set forth, and that in such case a former tenant shall be deemed to be a predecessor in title to him, when, according to legal interpretation of the words, he would be deprived and would not be a successor in title.

I cannot concur in the argument which carries that legislative accretion, under certain circumstances, to the words "predecessors in title," in section 7, to another section dealing with another set of circumstances, where the words "predecessors in title" are simply used and no accretion of meaning attached to them; and I cannot concur in the judgment of the

(1) Ir. R. R. & L. App. 82.

learned Judicial Commissioner, that the legal meaning of the words—their plain ordinary meaning—is a strict technical meaning. Neither can I accept the argument that, because in one section and under peculiar circumstances a word is declared to have a signification different to its legal one, *ergo*, the same word, when used in another section, is also to have a different signification from its legal sense—*e. contra, expressio unius exclusio alterius*.

As to the 3rd question, the Commissioners, in order to determine a fair rent under the 8th section, have to regard the interest of the landlord and tenant respectively. The interest of the former is the plenary interest in the holding, save so far as the tenant establishes in diminution claims under the Acts of 1870 or 1881. These claims constitute the tenant's interest. What is the tenant's claim under the Act of 1870 in respect of improvements made before the passing of that Act? [Reads section 4, Act of 1870.]

The tenant's claim is by the final paragraph limited, as to improvements made before the passing of the Act, by the period of enjoyment, that is, to the extent the tenant has been repaid by enjoyment.

The Act of 1870 was so administered by all tribunals. When the Act of 1881 passed, the tenant's interest, in respect of improvements made before 1870, was not in name or substance a claim to have them recognised as his, or a claim to their full value, but a claim to be compensated so far as he had not been compensated by enjoyment in the various degrees of time, &c., as set forth in section 4. Such legislatively compensated for improvements could not, in the teeth of the Act of 1870 (incorporated with the Act of 1881), be part of the tenant's interest within the meaning of section 8; and if not, they are part of the landlord's interest, to be so regarded in fixing a fair rent.

But is this altered by sub-section 9? In my opinion, No. That sub-section in that respect only re-affirms in more special language, that the tenant's improvements are not to be assessed in rent; it does not purport to repeal section 4 of the

Act of 1870, by which improvements made by a tenant or his predecessor in title before the Act were, under the circumstances and with the measures set forth respectively, declared compensated for, and were consequently not to become, but to remain the property of the landlord, and as such, part of his interest in ascertaining his fair rent, and, "being the landlord's property what part of sub-section 9 takes them from him, the Act of 1870 *non obstante*?

Similar considerations may apply to provisos of section 4, such as proviso 1 (*a*), and proviso 3, whereby a thirty-one years' lease enjoyed by a tenant was deemed full compensation, with certain exceptions.

Question 4. This question I consider necessarily calls for a consideration of the meaning of the 9th sub-section, as to what is meant by "otherwise compensated by the landlord or his predecessors in title." It was argued here, on the part of the tenant, that it should be compensation *ejusdem generis* as "paid." It appears to me to be the contrary. "Otherwise" signifies "by any other means," which, so far from being *ejusdem generis*, might be of the most opposite character. "Compensated,"—the word so often used in the Act of 1870—signifies "indemnified from loss."

The section so interpreted would read thus:—"No rent shall be allowed for improvements made by the tenant or his predecessors in title for which the tenant, &c., has not been paid, or by any other means been indemnified by the landlord or his predecessors in title"—that is, out of the property of the landlord.

The learned Judicial Commissioner, says: "Under the Act of 1881, the compensation must emanate from the landlord. In order to enable him to claim rent in respect of *the tenant's* improvements he must, so to speak, have bought them from the tenant, paid him for them, or otherwise compensated him. What amounts to such a compensation? It may take a hundred forms which it would be impossible to enumerate, but it must, I conceive, be something given or done or foregone by the landlord, as an equivalent for the im-

provements. We are not called on to decide whether a lease given at a low rent in order to enable the tenant to improve might not in some cases be held to be compensation; nor whether in the case of tenancies from year to year the landlord's abstention for a considerable period from the exercise of his legal right to evict the tenant, or enforce a larger rent from him by menace of eviction, might not, in some cases, be deemed compensation by him. Every case of that kind would, I conceive, be governed by its own special circumstances."

I do not much differ from this reading of the section, with the following modification, viz., firstly, the use of the ambiguous word "emanate:" if by that he means that there must be some active "giving" by the landlord, it is in my opinion a mistaken view. Again, he says by way of illustration, "we are not called on to decide whether a lease given at a low rent, in order to enable the tenant to improve, 'might' not in some cases be held to be compensation." I should say such a case could admit of no doubt but that "it might." Again, he says, "in the case of tenancies from year to year the landlord's abstention for a considerable period from the exercise of his legal right to evict, or enforce a larger rent by menace of eviction, might in some cases be a compensation." Here again the words "menace of eviction" introduce the false element of any action, whether actual or by threat, on the part of the landlord.

The mere abstention by the landlord of availing himself of his legal rights, and allowing the tenant to enjoy what if the landlord chose he might enjoy himself, must, in my opinion, be a compensation by the landlord irrespective of threat or statement to that effect.

Mr. Commissioner Litton cuts the Gordian knot by elaborating a compendious formula, and proceeds to state it thus: "The question is, to what extent has the letting value been increased by the improvement, if at all?" Deducting the latter from what he has described as the commercial value of the holding, he adds, "we get the fair rent." What we have decided as to the true meaning of the word "improvements," viz., "that it is not the

same as the increase of the letting value," destroys this formula as its outset. Passing on further to the consideration of the words "otherwise compensated," the same learned Commissioner lays down thus: "The words paid or otherwise compensated by the landlord must mean either actual payment, or some positive and direct consideration moving from the landlord to the tenant, and not an enjoyment of occupation which has no reference to the improvements."

During the argument of this case this proposition was described by THE LORD CHIEF BARON as placing the enjoyment on the basis of contract, express or implied, when he asked the leading counsel for the tenant whether he so argued.

I have already in effect stated what appears to me fairly clear, viz., that the enjoyment by the tenant is not necessarily to rest on the basis of contract between him and his landlord; it rests on the basis of compensation in fact obtained by him out of the landlord's property, irrespective of whether the landlord actively or passively permitted or knew of the enjoyment—considerations, in my opinion, outside the real one, viz., "indemnification by the tenant out of the landlord's property," *e.g.* enjoyment at a low rent for a long time. The construction contended for by the tenant requires us to interpret the sub-section as if it contained, in express words, that time of enjoyment should not be held to be compensation.

I cannot, however, apply the principle of compensation out of the landlord's property to improvements made during the currency of this lease, and of which the only enjoyment was the period that the lease lasted. In the restricted sense of the word "improvements," which we decide is its legal significance, what enjoyment is there during the lease out of the landlord's property?

If in the present case Mrs. Dunseath had not raised the rent on the expiration of the lease, there would be from that period clear enjoyment by the tenant out of her property *pro tanto*.

When the stipulated term had determined—during which the landlord could not disturb the tenant's possession, or raise his rent or impose any fresh terms—the aspect changed; a

parol tenancy from year to year sprang up; the tenant would be left in the enjoyment of improvements with which it was competent for the landlord to interfere by raising the rent: the consequent enjoyment by the tenant of the whole unshared benefit of the improved holding, including its developed and realised capability, would amount *pro tanto* to compensation by the landlord; and I know of no form of compensation more advantageous to the tenant; it furnished the distinction between landlords who left the tenant the entire fruit of his improvements, and those who insisted upon sharing in the advantages derived from them by increase of rent.

As to the 5th question I am of opinion that Mrs. Dunseath is entitled to rent for the house.

The house being on the land when James M'Kee took his lease in 1846, by whomsoever built, he took it as the landlord's property. This result follows necessarily from the opinion I have formed on the question of "predecessor in title," as this case in respect of the house would be not alone in principle, but almost in fact, the same as *Holt v. Harberton* (1).

It becomes unnecessary to decide whether, on another point suggested in argument, the same result should not be arrived at.

The widow Dunseath's husband bought, with other property, the reversion expectant on the lease to M'Kee, in the Incumbered Estates Court, in 1851, and a conveyance was executed to her by the Judges of that Court. That conveyance, by statutable and indefeasible title, conveyed to the purchaser the estate as then improved, subject only to the lease of 1846, and any rights flowing *from it*—I say emphatically "from it," but with no reservation of any rights, real or imaginary, that would flow, or might be supposed to flow, from anything done at an earlier period than the date of the lease.

What reduces the purchaser under the Incumbered Estates Court title from being the grantee of an improved estate, [*i. e.*, of an estate with its then improvements, to the position of a

(1) Ir. R. R. & L. App. 82.

grantee of an estate practically minus the improvement? The question remains, whether the general words in the 9th subsection relate back not alone to tenancies existing at the time of the passing of the Act of 1881, but to tenancies and to improvements made during past tenancies, by the tenant and his predecessors in title, and thus getting behind the conveyance, attach improvements to a past tenancy which, even if it had existed in 1851, would be destroyed by the Incumbered Estates Court conveyance—propositions it might be difficult to establish. In arriving at these conclusions on these questions, I have endeavoured to loyally obey and give effect to the meaning of the statute, where its meaning is clear and plain, irrespective of any individual opinion of its policy or impolicy, or what injury it may entail on individuals. But where the terms are obscure or ambiguous—I use the words of an eminent Judge—"the Court should not lose sight of the principle that a party is not to be stripped of his undoubted property or rights by ambiguous terms of an Act of Parliament."

Finally, I desire to acknowledge the assistance I have derived from the full and able judgments of the learned Commissioners, though I am, on some points, unable to arrive at the same conclusions they have—conclusions which, in the terse but pregnant judgment of the Lay Commissioner, appeared to him to lay down principles and to lead to results which were never contemplated by the legislature.

Here my judgment concluded; but I make this remark on THE LORD CHANCELLOR'S reference in his judgment to the Ulster custom as affecting this case. No reference is made to it in the case stated for our judgment—none in the judgments of the learned Commissioners—none was made during the argument before us, and none (so far as appears) during the argument before the learned Commissioners at Belfast. I must, therefore, decline a legal exercitation on assumptions not put before us, and, for aught I know, non-existent.

PALLES, C.B. :—

All the questions stated by THE LORD CHANCELLOR as those upon which this Court is to pronounce its opinion arise upon the construction of the 8th section of the Act of 1881. That statute and the Act of 1870 must, as well upon the ordinary principles of construction of Acts *in pari materia*, as by the express legislative declaration contained in the 57th section of the later Act, be construed together as one code. In considering these two Acts, I shall limit myself to the enactments material to the question before us, viz., to so much of the Act of 1870 as provides compensation for improvements; and such portions of the Act of 1881 as, firstly, amend those provisions, and secondly, entitle a tenant to hold on for the statutory term. In these portions of the Acts I find two distinct objects, first, that a tenant *on quitting* his holding shall be entitled to certain compensation for improvements; secondly, that a tenant of a certain class shall not be bound to quit his holding at all, but shall be entitled to hold on for a term of fifteen years practically renewable for ever. When, as in the present case, a tenant who is so entitled avails himself of his right to obtain a statutory term, there is not, and cannot be, a *quitting*, within the meaning of the Act of 1870; and the main question we have to decide is, what in that event is his right in respect of improvements?

Improvements are defined by the 70th section of the Act of 1870 to be works which increase the letting value of the holding, and are suitable to it; and the 4th section of that Act provides that a tenant may, on quitting his holding, claim compensation to be paid by his landlord, in respect of *all* improvements on his holding, made by him or his predecessors in title. The general words of this enactment are, however, at once cut down by the first proviso, which describes five classes of improvements in respect of which it enacts “a tenant shall *not* be entitled to claim any compensation.” The first of these classes is “improvements made before the passing of this Act, and twenty years before the claim of such compensation shall have

been made, except permanent buildings and reclamation of waste lands." The second proviso further limits the class of improvements in respect of which a tenant can claim compensation; and the third proviso is to the effect that when a holding is under lease for a term certain of not less than thirty-one years, the tenant shall not (in the absence of special provision in the lease) be entitled to compensation in respect of any improvements, except permanent buildings, reclamation of waste lands, tillages, and manures. The fourth proviso uses the expression "his" (the tenant's) "*interest in his improvements*"; and the final clause enacts that in awarding compensation in respect of improvements made before the Act, the Court shall, in reduction of the claim of the tenant, take into consideration (1) the time during which the tenant shall have enjoyed the advantage of such improvements, (2) the rent at which such holding has been held, and (3) any benefits which such tenant may have received from his landlord in consideration, expressly or impliedly, of the improvements so made.

These provisos show that works which add to the letting value of, and are suitable to, a holding (and therefore improvements within the 70th section) are not, although made by the tenant or his predecessors in title, necessarily improvements in respect of which the tenant has a *right* to receive compensation. That he may have this *right* in respect of them, the works must in addition be outside the 1st, 2nd, and 3rd provisos, and the amount of compensation he had a *right* to receive in respect of such works is liable to reduction in respect of the matters mentioned in the final clause of the 4th section.

The expression "predecessors in title" was, in my opinion, rightly construed by the majority of the Court for Land Cases Reserved, in *Holt v. Harberton* (1). If, therefore, the present case were governed by the Act of 1870 alone, the tenant Adams, were he now quitting, would have been disentitled to claim compensation for any of the improvements executed before 1875, as the continuity of title had been broken by the new tenancy created in that year. He would further have been

(1) Ir. R. R. & L. App. 82.

disentitled (even if the continuity had not been broken) to claim for any works, except the house and reclamation of waste lands (if any), executed before 1862.

This state of the law was, however, amended by the 7th section of the Act of 1881.

The subject-matter of the first clause of this section (the portion which is material here) is the "*right*" of the tenant to receive compensation under the Act of 1870; and the subject-matter of the second clause (which is *in pari materiâ* with the first) although expressed in different terms, is in fact the same, as a *title* for the purpose of obtaining compensation for improvements can exist only in respect of works for which the tenant had a *right* to obtain compensation. Were it not for the third clause, which imposes upon the Court, in adjudicating upon any claim falling within the prior portions of the section, a duty (not prescribed by the Act of 1870) of taking into consideration all the circumstances under which the change of tenancy took place, and admitting, reducing, or altogether disallowing the claim accordingly, I should have thought it open to argument that the second clause of this section was declaratory of the construction of the Act of 1870. Such a construction is, however, in my opinion, rendered impossible by the latter clause; but I confess that, in reference to the question now under consideration, I think it of little importance whether the section be or be not to a certain extent declaratory, for, whatever be its nature, it seems to me clear that its wording renders it impossible to give the extended construction to the expression "tenant or his predecessor in title," except where these words are read in reference to the *class* of improvements to which alone they are applied in the 7th section. The cases to which the extended construction applies are, therefore, *primâ facie* subject to, and restricted by two (but as far as I can see by only two) limitations—one, a limitation involving the procedure by which effect is to be given to the tenant's right to compensation—viz., upon a claim on the tenant *quitting* his holding; the second, and in my mind the most important one, a limitation involving the subject-matter in reference to which the extended

construction *can* apply, viz., not improvements generally, but improvements (to revert again to the words at the commencement of the 7th section) in respect of which the tenant had a "*right to receive compensation.*"

I now turn to the provisions of the Act of 1881, in reference to the statutory term. Section 8, sub-section 3, enacts—"Where the judicial rent of any present tenancy has been fixed by the Court, then, until the expiration of a term of fifteen years, such present tenancy shall (if it so long continue to subsist) be deemed to be a tenancy subject to statutory conditions." Section 5 provides that a tenant of such a tenancy shall not be compelled to quit his holding, except in consequence of the breach of some one or more of the statutory conditions. The 8th section in sub-section 1 empowers a tenant of a present tenancy desirous of obtaining this tenure, to apply to the Court to fix a fair rent, and the Court, "*having regard to the interests of the landlord and tenant respectively,*" is to determine what is such fair rent.

I pause here to repeat what I have already observed, that the tenant by entitling himself to hold on for fifteen years, has postponed for that, and possibly for a much longer period, the quitting upon which he would have been entitled under the Act of 1870, to claim for the improvements in respect of which he had a right to receive compensation. He has not, however, thereby lost his *interest* in those improvements. If, therefore, his *interest* in improvements is to be at all considered in settling a fair rent, it must be so considered, although there has not been a quitting, and therefore although a claim under the 4th section of the Act of 1870 could not be sustained.

This 8th section, accordingly, in its 9th sub-section, enacts—"No rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by the tenant or his predecessors in title, and for which in the opinion of the Court the tenant or his predecessors in title shall not have been paid or otherwise compensated by the landlord or his predecessors in title."

Were the class of improvements within the sub-section a larger one, than that to which "predecessors in title" is, by

the 7th section applied in its extended sense, I would agree with THE LORD CHIEF JUSTICE and THE LORD CHIEF JUSTICE of the Common Pleas, that the extended construction could not prevail in this sub-section, because that would be to apply that construction to a subject-matter to which there is no intention on the face of the Act that it should be applied.

But, on the other hand, if the improvements referred to in the sub-section are identical with those within the 7th section, then one of the two difficulties of the application of the extended construction does not exist. What then, upon the true construction of the sub-section, are the improvements contemplated by it? To determine this, I must read this 9th sub-section as part of, and in connection with, the other provisions of the 8th section. So reading it, I am of opinion that it was not contradictory to, but in explanation and enforcement of, the principle contained in the 1st sub-section, which, in my opinion, contains the key to the entire section, viz., that in fixing the fair rent regard should be had to the interest of the landlord and tenant respectively. In my view it was not intended by this sub-section to provide that the Court should not have regard to the interest of the landlord or to transfer to the tenant any part of that interest, either in the holding or in the improvements thereon. Even were the context doubtful, a construction involving such a consequence could not obtain. But the context is, in my opinion, not doubtful. The improvements in respect of which rent is not to be payable are restricted by the words, "and for which, in the opinion of the Court, the tenant or his predecessor in title shall not have been paid or otherwise compensated by the landlord or his predecessors in title," and these words demonstrate an affirmative intention that the landlord's interest in the improvements should not be transferred to the tenant. Compensation may be partial as well as complete, and may be partial even in respect of one indivisible work. Therefore the words I have last mentioned must define not only the class of works but the extent of the interest or property in these works, in respect of which rent is not to be payable. If I be right in the conclusions at which I have

arrived, viz., first, that the tenant had an *interest* in improvements made by himself or his predecessors in title, as used in its wider signification; secondly, that there is in the 9th sub-section an intention not to transfer property in improvements from landlord to tenant; what remains to satisfy the expression in the 9th sub-section, “improvements made by the tenant or his predecessors in title, and for which in the opinion of the Court the tenant or his predecessors in title have not been paid or otherwise compensated by the landlord or his predecessors in title?” I answer, that which can alone remain, unless some part of the property of the landlord in the improvements be transferred to the tenant, the *interest* of the tenant in the improvements, and this interest he can have in *such* improvements only as he had a *right* to receive compensation for. These are the improvements, and in my opinion the only improvements, within the section; and the property in this class of improvements is cut down by the words, “and for which the tenant or his predecessors in title shall not have been paid or otherwise compensated by the landlord or his predecessors in title,” to the *interest* of the tenant therein, which has been uncompensated by the landlord. This interest, although vested and existing, was one the money value of which depended upon a future and contingent event—upon his quitting his holding; and, in my opinion, the operation of this sub-section is to give effect *in præsentia* to that interest by exempting it from rent. Reading the sub-section in this sense, an effect is given to it which is consistent with every other provision of the section, and is in furtherance of the essential principle of that section, that “regard shall be had to the *interests* of the landlord and tenant respectively.”

But the improvements in which the tenant has this interest include those made by his predecessors in title in the wider sense mentioned in the 7th section. I therefore have (1) that regard is to be had to the interest of the tenant; (2) that that interest includes interest in improvements in respect of which he has a right to claim compensation, that is, improvements made by himself or his predecessors in title as used in the wider sense; (3) a direction in the 9th sub-section that no rent

shall be allowed in respect of the interest of the tenant in improvements made by him or his predecessors in title in respect of which he has a right to claim compensation. It seems to me to follow that the expression "predecessors in title," in the 9th sub-section, must, in order to make the interest of the tenant, which was intended to be protected, co-extensive with the interest which he in fact had, and to which regard is directed to be given, be read in its extended meaning, unless there be something in the context of the clause giving this wider meaning, which absolutely prohibits such an application.

This brings us back to the 7th section to inquire whether it contains this absolute prohibition. I revert to the two limitations which I endeavoured to show restricted, and were the only limitations which restricted, the extended construction. As to the first (which involves the procedure), it is rendered inapplicable by the express legislation of the 9th sub-section. That section substantially directs the consideration, upon an application to fix a fair rent (without a claim for compensation, and although there is no quitting), of improvements which under the previous legislation could be considered only upon such claim, and after such event. As to the second, the construction which I have given the word "improvements made by the tenant or his predecessors in title" renders it identical with the subject-matter as to which, and to which alone, I have shown the words "tenant or his predecessors in title" can obtain their extended construction.

In result, then, I am of opinion that the suggested difficulties of giving the extended meaning to "his predecessors in title" in the 9th sub-section do not in fact exist, and that the intention gathered from the 8th section requiring these words to be read in that sub-section in that extended meaning must prevail. These considerations enable me to answer the 1st, 2nd, and 3rd questions.

As to the 1st, I am of opinion that the word "improvements" in the 9th sub-section means works which, being suitable to the holding, add to its letting value, as distinguished from the increased letting value itself. It is in this sense "improve-

ments" are defined by the 70th section of the Act of 1870; and the 57th section of the Act of 1881 enacts that expressions in that Act which are not thereby defined, and are defined by the Act of 1870, shall, unless there is something in the context repugnant thereto, have the same meaning as in the last mentioned Act.

In answer to the 2nd question, I am of opinion that "predecessors in title" in the expression "the tenant or his predecessors in title," in the 9th sub-section, mean predecessors in title in the extended sense in which that expression is used in the 7th section.

As to the 3rd question, being of opinion that that which has been exempted from rent is not the entire work, but the uncompensated interest of the tenant in that work, it necessarily follows that I am of opinion that enjoyment by the tenant of improvements executed before the passing of the Act of 1870, which, by the express terms of the 4th section of the Act of 1870, is to be taken into consideration in reduction of the tenant's interest in such work, cannot be excluded from consideration in determining fair rent.

As I understand the judgment of THE LORD CHANCELLOR, who has arrived at a conclusion upon the 3rd question different from mine, the point of divergence between us is the extent of the interest of the tenant under the 8th section in respect of improvements. THE LORD CHANCELLOR is of opinion that, as the tenant is entitled under section 1, sub-section 3, to sell his holding in the open market, subject to a right of pre-emption in the landlord to purchase, at the *true value*, the interest of the tenant in the improvements is the difference between what would be the selling value of the farm in its unimproved state, and its actual selling value when improved. This construction subjects this holding (which is not in fact subject to the Ulster Custom), and subjects also every other holding to which the Act applies to a right analogous or similar to the Ulster Custom. The effect of this would be to give to the tenant, under the word improvements, the entire of the increased letting value caused by such improvements—

a result disclaimed by THE LORD CHANCELLOR. Irrespective, however, of what the result may be, I cannot agree either in the conclusion of THE LORD CHANCELLOR, or in the reasoning on which it is founded. The tenant has, no doubt, a right to acquire a term of fifteen years, with a right of renewal from fifteen years to fifteen years; but that right has not yet been acquired. We are not now determining the right which the tenant may have at the end of a term of fifteen years in reference to improvements executed after the Act, and when he had practically a perpetual interest in his holding. The question we have here deals with the conditions upon which the tenant is entitled to acquire his first statutory term. Until he acquires this term, he has nothing more to sell than a tenancy from year to year—a tenancy which he was entitled to sell before the Act of 1881. The conditions upon which he is entitled to acquire the fifteen years' term include payment of a fair rent, and the question is, subject to what fair rent shall he acquire his statutory term? Were there no express provision in the Act as to the interest of the landlord, you could not, as a condition precedent to determining what rent he should pay for a term of fifteen years, assume that he already had an interest practically perpetual, and deduct out of the amount which would otherwise be a fair rent the annual equivalent of a perpetual interest in improvements. But, the 8th section is express, that the Court is to “have regard to the interest of the landlord and tenant respectively,”—that is, to the interest which these parties have at the time the rent is being ascertained, and before the period arrives at which the tenant acquires his statutory term. Were the statute read in the view of THE LORD CHANCELLOR, its effect would be to transfer to the tenant all the property of the landlord in improvements which had been effected by the tenant, notwithstanding that some of such improvements had, under the provisoes of the 4th section of the Act of 1870, become parcel of the holding, without liability upon the landlord to pay any compensation in respect of them, and that the amount of compensation payable in respect of others had

been materially reduced by enjoyment. I have searched the Act in vain for words which indicate such an intention. To liken the case to one of Ulster Custom is to assume that the only essential element of that Custom is the right of sale in the tenant, whereas, in fact, the foundation of the Ulster Tenant-right is the liability, on the part of the landlord, to pay the full value of the holding upon an eviction in breach of the Custom. The right of sale existed in all common law tenancies from year to year: it was a right which the Ulster Custom could not extend, but with which, in many instances, it materially interfered.

The 4th question is, "Whether the enjoyment, during the currency of a lease, of improvements made by the tenant during such lease, but after the passing of the Act of 1870, is a compensation by the landlord within the meaning of the 9th sub-section of section 8 of the Act of 1881?"

By "improvements," in this question, I, of course, understand suitable works which add to the letting value of the holding, not the increase of such value. Reading the question in this sense, I am of opinion that upon the true construction of the sub-section, this enjoyment is not compensation by the landlord. As the question is limited to improvements made after the Act of 1870, the final proviso in the 4th section of that statute does not apply; and we must therefore inquire whether, irrespective of the statute, such enjoyment may amount to compensation.

To be compensation under the 4th section, it must be compensation "by the landlord or his predecessors in title"—words which, in my opinion, include the estate of such landlord or predecessors in title. The increased letting value caused by the improvements is, no doubt, not the creation solely of the tenant: it is the result partly of the expenditure and skill of the tenant, and partly of the inherent capabilities of the soil. Of these two elements, however, the first is supplied solely by the tenant, and the second, the inherent capabilities of the soil, is portion of that which has been let to him by the landlord for the term of his lease. Those capabilities, although unused at the time of

the lease, and capable if used of producing a profit perhaps not in the contemplation of the parties at the date of the lease, are portions of the thing which the tenant has acquired by his contract, and which he is entitled to utilise in every reasonable mode not contrary to that contract.

It is impossible to hold that this increased letting value during the tenancy has been produced by the landlord, or by his estate, or can be deemed compensation by him within the meaning of the section. No doubt it may be said, in one sense, that the landlord's "estate" contributes to the result: but in that sense "estate" is used in its popular signification, meaning the land of which a particular proprietor is the landlord, and not his reversion or legal interest in the land. The increased value during the lease is no more contributed to by the landlord than he contributes to the growth of grass on the pasture-land which he has demised as such to his tenant. This view is sustained by the 5th sub-section of the same 8th section, which requires the landlord, on exercising his right of pre-emption on sale of his tenant's holding, to pay the specified value for the tenancy, together with *the value* of any improvements made by the tenant since such specified value was fixed. Value of improvements here must mean true value, and excludes reduction by reason of their enjoyment.

I, however, offer no opinion whether possession after the termination of a lease, whether under a new contract or not, or possession under a tenancy from year to year, which a landlord might have, but in fact has not, determined, *may* not amount to compensation within the meaning of the 9th sub-section.

The 5th and last question is, "Whether the lease of 1846 excludes the tenant from any interest in respect of the house built before the execution of that lease, in the ascertainment of the fair rent of his holding?"

The facts material to the question appear to be as follows: Prior to 1842 the lands in question were in the possession of one James M'Kee as tenant under the Earl of Mountcashel, but at what rent does not appear. In 1842 the lands were valued by valuers appointed by the Earl, at the yearly rent of

£26 11s. 6d.. From the time of the valuation in 1842 this rent of £26 11s. 6d. was paid by James M'Kee. M'Kee, being thus tenant, at some time about the year 1844 erected a house, using in some degree for that purpose the materials of an older house previously existing. Prior to the building of this house the agent verbally offered M'Kee a lease; and, as I understand the case, offered it at the rent of £26 11s. 6d. M'Kee at the time of the erection of the house understood that he could have a lease if he desired. No actual contract for the lease was, however, made prior to the building of the house; but on 2nd March, 1846, being after the completion of the house, the Earl leased the premises to M'Kee for thirty years from 1st November, 1845, at the same rent, £26 11s. 6d., which M'Kee had previously paid. Upon the 27th October, 1846, M'Kee assigned to John Adams, who died about 1869, and it is admitted that the estate and interest of John Adams in the holding became upon his death legally vested in David Adams the present tenant. The lease expired on 1st November, 1875. These are the only facts in relation to this question found by the case, and it is to be remembered that by the section of the statute under which this case is stated, our jurisdiction is to determine questions of law *only*. We are not at liberty to assume facts, or even to draw an inference of fact from facts stated in the case.

The opinion I have expressed upon the 2nd question shows that, in my view the question whether this lease excludes the tenant from any interest in respect of the house in the ascertainment of the fair rent of his holding, is identical with another, "whether the lease excludes the tenant from compensation (in respect of the building of the house) under the 4th section of the Act of 1870, as amended by the 7th section of the Act of 1881."

The decision in *Holt v. Harberton* (1), as expounded by the reasons expressed for their judgment by the majority of the Court, coerces us to hold that, were the case governed by the

(1) Ir. R. R. & L. App. 82.

Act of 1870 alone, the tenant would be so excluded. The question, then, must rest upon the 7th section of the Act of 1881—"a tenant on quitting his holding shall not *be deprived* of his right to receive compensation for improvements under the Act of 1870, by reason only of the determination, by surrender or otherwise, of the tenancy subsisting at the time when such improvements were made by such tenant or his predecessors in title, and the acceptance by him or them of a new tenancy."

Now first, it is said by Mr. Holmes that the section does not apply in the present case, as the lease expired in 1875, and the law then regulating rights to compensation was the Act of 1870, under which it is conceded the tenant would have had no right to compensation had he then quit. He cannot, it is said, have been *deprived* by that lease of that which he never had, a right of compensation. In my opinion this argument is unsustainable. This section amends the Act of 1870. That Act in its 4th section deals with claims for compensation for improvements on a tenant quitting his holding, and the 7th section (the amending enactment) must, from the date of the passing of the Act of 1881, be read into, and incorporated with, the 4th section of the prior Act, and the section so amended is applicable to every claim in respect of a quitting after the passing of the Act of 1881. Had the old tenancy of 1842 not been determined by the acceptance of the lease of 1846, the tenant, *if now quitting*, would, under the Act of 1870, have had a right to compensation for the house, and in my opinion the effect of the legislation of 1881 is to prevent the determination of that old tenancy, and the acceptance of the lease of 1846, depriving the tenant of that right.

I pass now from this question of time, and shall consider the case as if the 7th section had been a substantive enactment in the Act of 1870. The mode in which the argument in favour of the extinguishment of the tenant's rights is put is as I understand it, thus:—By the lease of 1846 the tenant took a demise, not only of the land, but of the house which was upon the land, and even of the house in express terms. By the acceptance of this lease, he is at common law estopped from denying that the

house, of which he so took a lease from the Earl of Mountcashel, was the property of the Earl, and his present claim to compensation for the building of that house is an assertion of fact contrary to his estoppel.

Let me test this argument: a similar estoppel would arise although the house were not specifically mentioned in the parcels of the lease. The house would have passed as part of the demised premises, whether mentioned or not. Again, although this lease is by indenture, a similar estoppel would arise in every case of a letting even by parol. The effect, therefore, of this reasoning, if pressed to its legitimate limits, would be, that a tenant holding over, after the expiration of his lease, and accepting a new tenancy from his landlord, would by such acceptance estop himself from denying that everything upon the land, including improvements made by himself, were the property of the landlord, and would therefore extinguish his claim to compensation. If this be right, what is the scope or effect of the 7th section? Such an argument, if sustainable, would simply repeal it.

In answer to this, it is said that although the legal effect of the lease would, before the Act of 1881, have been the same whether the house were or were not mentioned in the parcels, yet the fact of it having been so mentioned has become material since the Act because it shows that the subject-matter of the lease was something different from the subject-matter of the old tenancy; and this, it is said, establishes a new relation between the landlord and tenant, and notwithstanding the Act of 1881 constitutes a new *terminus a quo* in respect of improvements.

I confess myself unable to see that the subject-matter of the old tenancy when it was determined was anything different from the subject-matter of the new lease. The house, having been built during the old tenancy, became part of the land, the subject-matter of that old tenancy, and the rent reserved upon that old tenancy issued as well out of the house (after it had been built) as out of any other part of the land.

It may not therefore be strictly necessary to consider whether the circumstances of the subject-matter of the new tenancy not being altogether identical with that of the old would necessarily

exclude the application of the 7th section. Nevertheless I do not wish that any misapprehension should exist as to my opinion on the question. That section does not limit the new tenancy (the acceptance of which, is not *per se* to extinguish the tenant's right) to a tenancy at the same rent, for the same terms or upon the same conditions as the old. It is most general in its terms, "the acceptance of a new tenancy." No doubt the section itself shows that the new tenancy must include part of the old holding, because the improvements to which the claim is to be preserved are improvements on the old holding, but I cannot be party to a construction which would determine that the incorporation in the new holding of a parcel of land not in the old, or the consolidation into one of two previously separate holdings would not be within the protection of the section.

The reasoning of my learned predecessor in *Holt v. Harberton*, where he relied upon the dealing of the parties having created a new relation, and given rise to a new subject-matter, was applied to the Act of 1870 alone, not to that Act as amended by the statute of 1881.

It must, of course, be admitted that there may be a determination of a tenancy, and the acceptance by the tenant, of a new tenancy, of such a character, and under such circumstances as to extinguish the claim for compensation for prior improvements, and, in my opinion, this Court cannot satisfactorily base their answer to the 5th question upon any *principle*, without determining what is the essential element in the new tenancy, or what the circumstances attending it, which will work such extinguishment. This question is, in my mind, capable of an easy answer. That which by the former law effected the extinguishment was the passing of the interest of the tenant, by surrender or otherwise, into the landlord, not the acceptance of the new tenancy. The acceptance of the new tenancy was of value only because it was it which worked the surrender; but the extinguishment itself was caused by the surrender, and not by the acceptance of the new tenancy, if that acceptance were separate and distinct from the surrender of the old. The terms, therefore, of the new tenancy were immaterial upon the question of extinguishment.

Now the legislature having declared that the determination of an old, and the acceptance of a new, tenancy, shall not of itself extinguish the claim, it in my opinion necessarily follows that in order to work that extinguishment there must be that in the transaction, which under the old law would have had that effect without a change of tenancy. I am not aware of any mode by which under such circumstances this could have been accomplished save by contract. In my opinion therefore the real question in every such case is now, one of contract. Did the landlord grant the new tenancy in consideration of the improvements, and did the tenant accept such new tenancy in satisfaction of such improvements? In other words, the tribunal charged with determining the question has not to deal with what was in the landlord's mind, uncommunicated to the tenant, nor with the proposal of the landlord, unaccepted by the tenant; but ought upon a review of all the facts to determine whether the transaction in itself amounted to an accord and satisfaction—an agreement to accept in satisfaction, and a giving, and accepting in satisfaction, in pursuance of that agreement. This, at all events, has the merit of putting the question upon the plain and intelligible ground, of (once the surrender and acceptance of a new tenancy has been declared by the legislature insufficient), requiring the existence of that which, at common law, without surrender or new tenancy, would work an extinguishment.

It may be said, and I have no doubt will be said, that in this construction I am giving no effect to the word "*only*" in the section—"the tenant shall not be deprived of his right by reason *only* of the determination of the tenancy." I answer, that effect may and ought to be given to the surrender of the new tenancy, but only as one of several circumstances all material upon the question of accord and satisfaction.

Viewing the case in this light I must answer this 5th question in the negative. I have no authority to determine as a matter of fact whether the tenant did or did not accept this lease in satisfaction of any claim which he might have in respect of the house. Considering that in 1846 the tenant had no legal ground to claim compensation for his house, it might not be an unreasonable inference that he willingly accepted a lease of it for thirty-

one years, as such compensation ; but it might, upon the other hand, be said that this lease was offered at the same rent before the house was built, and that it does not appear that the offer was made upon the condition, or with the intention, that the house should be built. But these are matters of fact, which I decline to discuss. We have nothing further before us than the determination of one tenancy, and the acceptance of another ; and in my opinion these two circumstances are in themselves insufficient to exclude the tenant's claim for prior improvements.

I wish it however, to be distinctly understood that I give no affirmative opinion that the tenant is *entitled* to compensation for the house. Before doing so I should have the determination of the Commissioners upon the matter of fact that the lease had not been executed in satisfaction of the claim.

I have but one word to add. It is in reference to the new tenancy created in 1875. To this the reasoning in respect of the transaction of 1846 equally applies. There is no finding of fact as to whether the new letting was or was not accepted in satisfaction of the tenant's claim for improvements. It is stated that after the expiration of the lease the premises were re-valued with a view to a re-adjustment of the rent, that the amount of the re-valuation was £31 17s. 6d., and that Mr. Raphael, the valuer, said that in valuing the lands, he took no improvements into consideration. There is, however, absent from the case, in reference to this letting, any statement that the new tenancy was accepted in satisfaction of the tenant's claim.

In result, therefore, I concur with Mr. Justice O'Hagan and Mr. Commissioner Litton, as to the meaning of "tenant and his predecessors in title" in the 8th section ; but I have found myself coerced to arrive at a conclusion different from theirs as to the applicability of the final clause of the 4th section of the Act of 1870, in the determination of the fair rent under the 8th section of the Act of 1881. In a case, however, of this importance, I think it right to guard myself against expressing an opinion upon any of the questions discussed in their very clear and able judgments, other than those which have now been made the subject of our express decision.

DEASY, L. J. :—

In this case the first question evolved by THE MASTER OF THE ROLLS from the case sent to us by the Land Court is, What is the true meaning of the word “improvements” in the 9th sub-section of section 8 of the Land Act of 1881? I think that, in deference to the opinions of the other members of the Court, I ought to answer it, though it is not one of the questions put to us by the Court, nor, as I think, necessarily implied in any of those questions. My answer to it is, that the word “improvements,” in the sub-section referred to, must be construed as having the same meaning as that which it has in the Act of 1870; because section 57 of the Act of 1881 enacts that any words or expressions in this Act which are not thereby defined, and are defined in the Act of 1870, shall, unless there is something in the context repugnant thereto, have the same meaning as in that Act; and the Act of 1870, except so far as it is expressly varied or altered by this Act, or is inconsistent therewith, and this Act, shall be construed as one Act.

There is no definition of the word “improvements” in the Act of 1881, and therefore I must refer to the definition of that word in the Act of 1870; and there I find that section 70 says, “The term ‘improvements’ shall mean, in relation to a holding, 1. Any work which being executed adds to the letting value of the holding on which it is executed, and is suitable to such holding; also, 2. Tillages, manures, or other like farming works, the benefit of which is unexhausted at the time of the tenant quitting his holding.”

I find nothing in the sub-section referred to which is inconsistent with or repugnant to the application to it of the definition which is contained in the Act of 1870.

Then we have to consider how the improvements stated to have been made in the present case are to be dealt with.

There are four classes of improvements, as to three of which questions have been put by the Land Court :—

1. The house built by James M’Kee before the lease of 2nd March, 1846.

2. Improvements made by John Adams, the father of David, after the assignment of the lease.

3. Improvements made by David Adams after the death of John, and during currency of lease.

4. Improvements by David Adams on a piece of bog which he took during currency of lease, and which, after expiration of lease, he continued to hold with the demised premises, at one rent, £36 7s. 6d.

No question is asked as to the improvements made by the present tenant, except so far as they are involved in questions 4 and 5, which relate to improvements made during the currency of the lease of 1846.

As to the house, I think the case is governed by the decision in *Holt v. Harberton* (1), where it was decided by eleven Judges that a tenant who built a house under circumstances precisely similar to those in the present was not entitled to compensation in respect of it at the expiration of the lease granted subsequently to its erection, but that the house would become then the absolute property of the landlord, discharged of any claim by the tenant. In that case, as in this, the tenant held as a yearly tenant, and while so holding built on the lands so held the house for which he claimed to be entitled to compensation. He afterwards took a lease of those and other adjoining lands, and undoubtedly the building of the house was the inducement which led to the granting of the subsequent lease; but there was no contract that, in consideration of the tenant's building the house, the landlord should grant the lease. The granting of the lease was a purely voluntary act on the part of the landlord, and the word "consideration," referred to and relied on by O'Hagan, J., was used in its popular, and not in its legal sense.

In *Holt v. Harberton* (1), Lord O'Hagan, L. C. (p. 83) says: "Two things are plain; first, that when the house was built the tenant had no legal right to compensation, and, secondly, that the lease of 1844 worked as a surrender by operation of law of

the antecedent tenancy, estopping the lessee who accepted it from any denial of the lessor's right to make it, and giving him a title new, and changed in all respects as to the quantity of his land, the rent to be paid by him, and the condition of his tenancy. This being so, the question is whether, under such circumstances, it is possible under the 6th section of the Land Act to allow the claim to register the house as an improvement."

All former title to the lands and improvement upon them was surrendered and done away with by the acceptance of that lease, and there is no other title to which he can be deemed a successor but the title under it. Before 1844, the father held other premises at another rent by another tenure. His title to them did not and could not devolve on his son, because he consented to its destruction. What did devolve on the Appellant was the new title substituted for the old under the lease, and we cannot go behind it and declare him to have succeeded to a title which was extinguished. The circumstances here are precisely the same as in that case, except that here there was no additional land demised; and therefore I think that the present case is governed by that decision. O'Hagan, J., relies on the judgment of Chief Baron Pigot in that case. But he arrived at the same conclusion as the other ten, though for different reasons, not expressing any dissent from their judgment. Surely that does not impair the authority of the judgment of the other ten. He says also, I am bound to say, it seems not to have decided the abstract principle contended for. Unquestionably, under the circumstances of this case, all former title had been surrendered and done away with, it being taken as assumed that the new lease was granted in consideration of the circumstance of the dwelling-house having been erected. But the passages from the judgment which I have read show that ten of the Judges did decide the abstract principle that the lease destroyed the claim for compensation.

At the time the Act of 1881 was passed, this house, therefore, was unquestionably the landlord's property, and the tenant had no right to claim compensation in respect of it.

can see nothing in that Act which has taken away that property from the landlord, and transferred it to the tenant. Reliance is placed on the 1st clause of section 7, as having that effect; but that clause only deals with tenants who had a right to compensation under the Act of 1870. A tenant, on quitting his holding, shall not be deprived of his right to receive compensation for improvements under the Act of 1870 by reason only of the determination by surrender or otherwise of the tenancy subsisting at the time when such improvements were made by such tenant or his predecessors in title, and the acceptance by him or them of a new tenancy. But here there never was a right to claim compensation for this house existing in the present tenant, or in his predecessors in title, and he was not deprived of anything in respect of this house by "reason only" of the determination of the tenancy subsisting at the time when such improvements—that is, improvements for which he might otherwise have got compensation under the Act of 1870—were made that Act had nothing to do with that house, and never gave him any claim in respect of it.

With respect to improvements made during the currency of the lease of 1846, by the father of David Adams, they became at its termination the property of the landlord. That was undoubtedly so at common law; and the Act of 1870 only altered the law to this extent, that it gave to the tenant on quitting his holding a right to get from his landlord compensation for all such improvements made by him or his predecessors in title, as were suitable to the holding and increased its letting value. But it had been held that where there had been a change of tenancy after the improvements had been made, by the acceptance by the tenant or his predecessors in title of a new tenancy, all right to compensation for improvements made previously to such change of tenancy was at an end.

It was to remedy this that clause 7 was introduced into the Act of 1881; and it provides for that case in express terms, and it is confined to that case, and deals only with tenants quitting their holdings and claiming compensation for improvements. Whether this tenant would come within its provisions it is not

necessary to decide. That would depend (1) on the question whether the section is retrospective ; (2), on the effect to be given to the words "determination by surrender or otherwise," in the 1st clause of section 7, which is the only part of it applicable to this case. I express no opinion upon either of those questions, as it is not necessary to do so. But assuming that it does apply, that would not change the property in the improvements. The right to claim compensation for improvements, and the obligation to pay, assume and proceed on the assumption that the improvements to be compensated for have become the property of the landlord, subject to the right of the tenant to compensation for them at the end of the tenancy. All that section 7 gives to the tenant is a right on quitting his holding to receive compensation for improvements made by his predecessors in title, and relief in asserting such right from the previous consequence of acceptance of a new tenancy after the improvements were made. But the tenant here is not quitting his holding. He is seeking to get a new lease of it for fifteen years, renewable *toties quoties* at a rent to be fixed by the Court. How can that contingent and future right, which may never be exercised, avail him to deprive the landlord of rent which he would otherwise be entitled to ? It ought be taken into account, under the 1st clause of section 8, as forming part of "the interest of the tenant" in the land in question. But it would be difficult to put any pecuniary value on it.

The Commissioners have not put any question to us as to the meaning of the words "predecessors in title" in section 9 of clause 8. But it has been considered as involved in this case, and therefore is put to us directly in one of the five questions submitted to us, and it has become necessary for me to state my opinion respecting it ; and I consider that they should receive their ordinary legal interpretation. This sub-section involves the transfer of a large amount of property from landlords to tenants. Previously to the Act of 1881, all improvements made by the tenant or his predecessors in title became on the termination of the tenancy the property of the landlord, subject to the right of the tenant to get compensation for them. By

this section the tenant gets the right to enjoy them for the statutable period without being charged any rent for them. That may be politic, wise and just, and I do not question its policy, its wisdom, or its justice. But I think that such a great change in the law, involving such serious consequences, ought not to be extended by construction beyond the legal signification of the words used by the legislature in effecting it. It ought not to be extended to cases not included in its terms, merely by inferences from another clause dealing with another subject-matter, and which is not referred to in it directly or indirectly.

It is a rule in the construction that words of known legal import are to be considered as having been used in their technical sense or according to their strict interpretation, unless there appears a manifest intention of using them in their popular sense, Dwaris, p. 578: *Poole v. Poole* (1); *Jesson v. Wright* (2). Lord Redesdale: "It is dangerous where words have a fixed legal effect, to suffer them to be controlled without some clear expression, or necessary implication."

"It is a very safe rule of construction to adhere to the words of an Act according to their grammatical and natural sense, unless it appears clearly from the context they were intended to be used in some other sense:" *per* Parke, J., in *Rex v. Ditchet* (3). The construction contended for must greatly extend the area of litigation between landlord and tenant; for it will, as O'Hagan, J., says, make the limit of the right of the tenant to improvements extend as far back as human testimony can be got, and will therefore give rise to increased litigation. The intention to effect this ought not to be lightly ascribed to the legislature by a strained construction of these words; I can only gather their intention from their words, and I cannot construe the words predecessors in title as if they were "predecessors in occupancy."

And now, with respect to the fixing of a fair rent and the ascertainment of compensation for improvements to the tenant,

(1) 3 B. & Bul. 620.

(2) 2 Bligh 56.

(3) 9 B. & Cr. 186.

I think we cannot and ought not to lay down any rule, or enunciate any principle which can or ought to bind the Court in the exercise of the unlimited discretion as to both subjects vested in them by Parliament. By the final clause of section 8 they are empowered and directed, "After hearing the parties, and having regard to the interests of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district, to determine what is the fair rent that should be paid."

It is impossible to frame words giving a larger discretionary power. What authority have we to limit the Commissioners in the exercise of that power without which the Act could not be carried into practical operation? In the same way, by subsection 9 they are invested with unlimited power to decide what amounts to compensation for improvements made by the tenant or his predecessors in title. They are to say in each case whether the tenant or his predecessors has or have "in their opinion," been compensated for improvements made by him or them.

There also, as in ascertaining what is a fair rent, it is impossible to lay down any rule, or enunciate any principle as to what are to be elements which should enter into the formation of their opinion as to what is compensation.

This Court is an exceptional tribunal created by Parliament, and invested by it with the unlimited discretionary powers to which I have referred, in order to carry out the great objects of public policy which Parliament had in view, and for the effectuating of which it was necessary that the Judges of the new Court should possess those powers.

The present Commissioners have been appointed by Parliament, and they have been provided with a numerous official staff to assist them in the discharge of their arduous duties. They are provided with Sub-Commissioners, whose duty is to go into the different localities, hear evidence on the spot, and inspect the holdings which are the subject of controversy. In cases of appeal, they can report the evidence taken before them to the Commissioners, who can take additional evidence. They have, besides, two official valuers, who make confidential

reports to them respecting any holding which may be the subject of an appeal.

Notwithstanding all that assistance, their duties are arduous and responsible. They have, as it were, to mediate between conflicting classes. But I am confident that they will discharge their duties with zeal, industry, and impartiality, actuated only by an anxious desire to do justice between landlord and tenant in all cases that may come before them.

FITZ GIBBON, L. J. :—

In consequence of observations which my LORD CHANCELLOR has thought it necessary to make, I wish to state, at the outset, that my judgment and all my remarks in this case proceed upon the assumption that the holding in question was not proved to be subject to any usage capable of affecting the ascertainment of a fair rent. I make this assumption, because no such usage is mentioned in the special case, nor during three days' argument has it been referred to at the Bar, and also because question No. 4 upon the case is founded upon the applicability of part of the 4th section of the Act of 1870, which in terms relates only to those tenants who are not entitled to compensation under the tenant-right sections 1 and 2, or who do not make any claim under either of those sections. If, therefore, the holding of David Adams be subject to any usage regulating or affecting the determination of its fair rent, the case has been stated under a misapprehension of the law applicable to it, or in the attempt, always difficult and dangerous, to obtain a decision of abstract principles for general application upon the facts of a single case, special rights of the individual litigants have been ignored.

It may be that, owing to the lease or otherwise, no usage affected this holding, or it may be that no substantial difference of rights is involved in the distinction ; and I am not aware that any variety of the Ulster custom excludes or affects the right of the landlord to a fairly valued rent, ascertainable from time to time upon principles at least analogous to those guiding the determination of a fair rent under the Act of 1881.

Upon the first question of law which we have eliminated from the case, I have to declare my concurrence in the unanimous judgment of this Court upon the error which seems to pervade the whole decision of the Land Commission, arising from the confusion of the term "improvements" with the increase of letting value consequent upon them, and to emphasise my own opinion of the practical importance of observing the distinction which the majority of the Commissioners have hitherto overlooked.

The existence of the mistake appears most plainly upon the judgment of Mr. Litton, who states the matter as a definite problem in subtraction. He says: "The competition value, less by the good-will arising from actual occupation, I call the commercial value of the holding." "From the result thus ascertained must be deducted *the amount which the improvements of the tenant or his predecessors in title have contributed to the present letting value.*" "The question is, to what extent has the letting value been increased by the improvement, if at all? Deducting the latter, when ascertained, from the former, we get a result which ought to represent a fair rent." This result he calls "the commercial value, reduced by the value of the tenant's interest in his improvements." In justice to Mr. Litton, it is to be observed that he seems to have fallen into this mistake by adopting the language of the Parliamentary Paper which he quotes; but though the Judicial Commissioner does not refer to the same guide for the interpretation of the statute, Mr. Justice O'Hagan distinctly adopts Mr. Litton's conclusion. He says: "Let us take the case of two neighbouring tenants holding under lease for the same term and at the same rent, say £30 a-year each. One tenant, by industry and outlay, effects improvements which make the holding worth £60 a-year; the other does not improve at all and his holding remains worth £30. At the end of the lease is the landlord, under this Act, to be entitled to assess the improving man at the full letting value of his holding, on the plea that he had compensated him? It seems to me that this would simply be a judicial repeal of the clause. In this view Mr. Litton concurs; but I regret to say

that our colleague Mr. Vernon does not take the same view, and thinks that our construction would work great injustice and hardship upon landlords." I am very far indeed from holding that a landlord could, in the case put, be entitled to assess the improving tenant at the full letting value of his holding, or in any ordinary case at any rent nearly approaching it; but the construction which Mr. Litton has stated, and in which the Judicial Commissioner has concurred, would give to the tenant in the case put the whole increase of letting value consequent upon his improvements, namely, £30 a-year, wholly irrespective of their cost or value.

The injustice and hardship of such a construction, which was not only apparent to Mr. Vernon, but was pointed out by Mr. Butt, especially in paragraphs 147, 193, and 194 of his remarkable work, may be easily illustrated by one or two examples:—Every improvement must to some extent, greater or less, depend for its return upon the holding on which the improving work is executed; but the contribution from the holding, as distinguished from that from the work, may, according to circumstances, vary from almost nothing to the largest part of the profit. In the case of a house, the building is generally almost the whole source of the increased letting value; yet even there the landlord is entitled to so much of the rent of the house as is derived from its site; and as similar houses in different situations bring in, by reason of their situations, different returns upon the outlay incurred in building them, even in such cases the proportion of such return which is justly attributable to the landlord's interest may largely vary. But take other classes of improvements. Two tenants holding at the same rent expend each the same amount of industry, skill and money upon drainage or reclamation. The letting value of the one holding—poor, thankless soil, or disadvantageously circumstanced—is increased by £50 a-year; while in the other case the land, from its inherent qualities, or its more favourable circumstances, returns three or four times as much. The capital invested by the tenant in the improvement is in each case the same, the difference of return arises from the

utilisation of advantages, or the development of resources, in which the landlord has the largest if not the whole interest. As a matter of fact, such advantages and resources are not paid for in advance; but when they are utilised and developed the landlord becomes entitled to his fair share of the return from them; yet the decision before us would stereotype the maximum interest of the landlord in his property as its letting value at the worst point to which evidence could carry back the description of its condition.

It is not for us to determine the amount of rent in any case, but we may direct attention to the large proportion of the letting value which in the present instance seems to be affected by the erroneous principle of the judgment, and to the large proportion of the rental which may be involved in its correction. Mr. Justice O'Hagan tells us that, according to the evidence of the tenant's valuers, £22 2s. 8d. only was the letting value, excluding the improvements, of the lands which, if in the hands of the landlord, might be worth £44, while the official valuers fixed the setting value of the land as it stood (excluding the buildings altogether) at £37 10s., and in the opinion of the learned Judge an allowance for such only of the improvements as were made during the lease would reduce the rent of £37 10s. at the least to the "judicial rent" of £30 15s. The proportion of value attributable to the improvements, therefore, varies from nearly 50 per cent. to over 20 per cent. (excluding the house) of the gross letting value of the holding. It will, of course, be understood that before any part of this difference is allowed to the landlord, the Land Commission should estimate the present value of the improving works, or, as Mr. Butt well expresses it, should ascertain what would it cost the landlord to put the farm into its present condition, supposing the improvements had never been executed, and upon that amount the improving tenant is entitled to a just and, I would add, a liberal return, while (except in respect of considerations of reduction and compensation) the landlord should not be allowed any rent whatever. In respect of the full present value of the additional

capital which his improvements have added to the holding, the tenant should be scrupulously protected in the enjoyment of a just and even of an ample return, but, after this has been provided for, the landlord is equally entitled to the return derived from the more active and profitable use of his interest in the holding. I guard myself, as THE MASTER OF THE ROLLS has done, from saying that the whole surplus profit belongs to the landlord, as I do not desire to prejudge the question which is not now before us, but which may hereafter arise, whether the tenant under the Acts of 1870 and 1881 has not an interest in the holding over and above his statutory tenure and his rights to compensation. Thus far, however, our unanimous statement of the rule appears to me to lead—the landlord is entitled, as part of the fair rent of the holding, to so much of any increase of letting value consequent upon improvements, after making a fair return to the tenant upon the value of the improving works, as is derived from the utilisation of the landlord's interest in the inherent qualities, advantages and resources of the holding.

Of course I have hitherto discussed the landlord's right independently of any additional allowance to which he may be entitled under the provisions as to compensation, and of any reduction of the tenant's right by reason of enjoyment, under the provisions applicable to particular classes of improvements.

Upon the next question, namely, Whether the terms "tenant or his predecessors in title," in section 8, sub-section 9, have the same meaning as in section 7 of the Act of 1881, I concur in result with THE MASTER OF THE ROLLS and THE CHIEF BARON, upon considerations also applicable to the 3rd question, "Whether the provisions of the final paragraph of the Act of 1870, section 4, are applicable to such improvements in determining fair rent under the Act of 1881, section 8?"

The statutes of 1870 and 1881 are not merely *in pari materia*; they are, under section 57 of the latter Act, "to be construed together as one Act," except where inconsistent. Wherever the amount of fair rent is to be determined, the first duty imposed upon the Court is to "have regard to the interests of

the landlord and tenant respectively." I cannot proceed to ascertain those interests while a tenancy continues, upon any other principles than those which are to regulate them if the tenant quits his holding. No other interest of the tenant anywhere appears upon the Acts than that for which he should receive compensation, or the true value of which should be ascertained, if he were quitting his holding or selling his tenancy under the landlord's power of pre-emption. What under his power of sale he can sell is only what he possesses himself; and this, upon quitting his holding, he must give to his landlord, upon the terms of receiving the judicially ascertained "true value," or the statutory compensation. Though the compensation on quitting is limited in certain cases where the true value ascertainable on sale is not, yet in all events, whether the tenant quits his holding, or keeps it in his own hands, or sells to his landlord, or to a purchaser in the open market, I cannot see that the tenant's interest in the holding must not be valued and considered as subject either to a fair rent payable at the time, or to the liability to have the present rent altered at any moment to a fair rent; and the first element of the value of the holding must be the amount of the rent to which it is fairly liable. Therefore, I cannot understand how the true value of that interest can be ascertained otherwise than by determining the fair rent, and valuing the tenancy as practically charged with the amount of that fair rent. If, and as far as, any improvements may have ceased to be the subject of compensation on quitting, or to be included in the property for which the landlord must pay the true value if he exercise his power of pre-emption, so far also must they be, as it seems to me, treated as having ceased to be included in that "interest of the tenant" to which, in ascertaining the fair rent, the Court is directed to have regard; and so far, as a necessary consequence, must regard be had to them as part of the landlord's interest, and as *pro tanto* a source of fair rent. Thus, as it seems to me, without express words, but by necessary implication, we are obliged to read the provisions of section 4 of the Act of 1870 as incorporated with section 7 of the Act of 1881, and both as

included in the elements of the respective interests of the landlord and tenant, to which, in fixing a fair rent under section 8, the Court must have regard.

The impossibility of consistently divorcing the elements of fair rent from those of compensation, or of construing the terms "tenant or his predecessors in title," differently in section 7 and in section 8, sub-section 9, was, to my mind, demonstrated by the cross-arguments into which counsel at both sides were driven upon the two sections, by the attempt to construe each section in the sense most favourable to their respective clients. Serjeant Hemphill was compelled to contend that a tenant, so long as he held his tenancy, was entitled to appropriate for nothing the value of improvements for which, if he were quitting his holding, he could not claim any compensation; while Mr. Holmes was forced to argue that the landlord was entitled, during the tenancy, to rent upon the value of improvements for which, if the tenancy were determined, he must pay full compensation to the tenant. In truth, the fair rent, and the allowance as against that rent for improvements, are, as it seems to me, but the *annual* equivalents, calculated with regard to present value and future enjoyment, for the *capital* values of the interests of the landlord and tenant respectively, which, upon the severance of their interests would be ascertained in fixing compensation. But in addition to these considerations, I think, as a matter of verbal construction, that in the 1st paragraph of section 7, in the mention of the "tenancy subsisting at the time when such improvements were made by such tenant or his *predecessors in title*," the term "predecessors in title" *must* mean those who held the tenancy before such a determination of a subsisting tenancy and such an acceptance of a new tenancy as is dealt with by the section; and I cannot think that the same words, when used, without any apparent reason for discarding the effect of section 7, in the subsequent provision, section 8, sub-section 9, of the same statute can be construed as unaffected by the previous clause.

It is quite a different matter, upon which I am sorry to say I must more fully explain myself hereafter, what is the effect

of section 7, what is the nature of the break in title which is within its operation, and what is the continuity of title which, notwithstanding its provisions, must still subsist to satisfy the other provisions of both the Acts. For the present I hold that section 7 regulates the effect to be given to the terms "tenant or his predecessors in title" as used in section 8, sub-section 9, but at the same time I stop far short of the conclusion that section 7 practically abolishes the necessity for tracing title, renders continuity of title in a defined tenancy immaterial, or reduces the meaning of succession in title to mere succession of occupancy in the capacity of tenant.

I also hold that the term "tenant" is used throughout the Acts not to designate merely the same person, but a person who at the different periods in question fulfils the character of tenant of the same holding under such a title as the Acts deem continuous. No one could, under any circumstances, in my opinion, claim as "tenant" for works done by himself for which, if the holding had passed to a successor, such successor could not claim. Suppose for example A B executed works upon a holding and was evicted, or surrendered, and the holding was afterwards relet to C D under a new contract of tenancy, A B could not, on becoming C D's successor in the new tenancy, claim to have any benefit under section 8, sub-section 9, to which C D was not entitled, nor call for a disallowance of rent on the ground that the improvements had been executed by himself as tenant at a former time.

The 3rd question is little more than a corollary to the 2nd question, upon what I will call the principle of uniform and consistent interpretation applied to both Acts. The final clause of section 4 of the Act of 1870 is not repealed; section 7 of the Act of 1881 expressly deals with rights to compensation under the Act of 1870, and no such right could escape the operation of that clause; therefore a provision which confers no new right, but in terms only saves the tenant from the deprivation of a right otherwise conferred, cannot exclude restrictions which were concomitant upon that right from its origin. Then if the prohibition to allow rent in respect of improvements must, as I think

it must, apply only to the tenant's interest in those improvements, and if that interest is for the purpose of fixing a fair rent to be ascertained by reference to the amount which would compensate the tenant for it if he were quitting his holding, it follows that the 3rd question must be answered in the affirmative.

The 4th question eliminated by us is substantially the same as the 5th question stated in the special case, abstracting considerations of fact, and adding the important words "by the landlord," which were omitted from the case. Upon this question I entertain a clear and unqualified opinion in favour of the tenant. The question is, "Whether the enjoyment, *during the currency of a lease*, of improvements made by a tenant *during such lease* is a compensation for such improvements *by the landlord* within the meaning of section 8, sub-section 9, of the Act of 1881?"

The question does not apply to reductions of the tenant's claim under the final clause of section 4 of the Act of 1870, nor to cases in which improvements made during a lease are in whole or in part brought within the consideration of the contract for making the lease; and otherwise I hold it impossible that the tenant's title to the protection of the sub-section can be in anywise diminished by his enjoyment of all the profits which, by improvements or otherwise, he can lawfully make out of his leasehold, or that such enjoyment can be regarded as in any degree *compensation by the landlord*. When the landlord makes the lease, he wholly parts, in consideration of the rent and covenants, with all his interest during the term, as well in any capacity for improvement which the holding may possess as in all the other incidents of its use and occupation. Whatever the tenant during his term can lawfully derive from his holding is his own, and though the profits of his improvements may more than compensate him for his outlay, yet this compensation is only the reward of his own industry, skill, or capital applied to property which for the term of the demise is his own; and I think their full enjoyment so long as the lease lasts cannot be regarded as in any degree a compensation by the landlord.

Though the Land Commission has not asked the much more important question which the facts of the case raised—whether the same principle must apply after the lease expires, the judgments of Mr. Justice O'Hagan and of Mr. Litton contain statements upon that subject so inconsistent with my view of the law, that, in order* to prevent my answer to the question put from being misapplied or misunderstood, I feel bound to make some observations by way of caution, on a subject with which THE MASTER OF THE ROLLS and CHIEF JUSTICE MORRIS have already dealt.

In my judgment, the words “paid or otherwise compensated by the landlord or his predecessors in title,” in their plain sense and in justice, include payment with the landlord's money, or compensation out of the landlord's property. A cash *payment* is contrasted with *compensation* by other means, and I think the terms include every form and manner of recoupment which the tenant receives, at the hands of his landlord, out of his landlord's pocket, or out of his landlord's estate, as an equivalent for his improvements. When the landlord, not being bound to do so by the terms of the tenancy or otherwise, permits an improving tenant to enjoy his holding at a rent below the fair letting value, and such permission is, under all the circumstances, referable to the tenant's improvements, it is justly to be regarded as *pro tanto* a compensation by the landlord for the tenant's improvements—always, however, safeguarding in the first instance to the tenant a fair return for the value of those improvements as part of the tenant's capital added to the holding.

I agree that the Court may or may not infer, from the acts of the parties and the circumstances of any particular case, that the tenant's enjoyment is or is not to be regarded as compensation, but I dissent from the principle that the words “paid or otherwise compensated by the landlord” must mean “either actual payment, or some positive and direct consideration moving from the landlord to the tenant;” or that “occupation as tenant from year to year, after the expiration of a lease, cannot be deemed compensation, unless it be expressly shown that such occupation was permitted with direct regard to the ante-

cedent improvements, and for the purpose of compensation." The question whether the tenant has been "compensated by the landlord" is in the very terms of the section one to be determined by "the opinion of the Court"—an elastic expression which seems to me inapplicable to the determination of a question of actual payment or of definite contract, but to be quite apposite to a matter resting upon the result of "considering all the circumstances of the case." The tenant must receive "something given or done or foregone" by the landlord as an equivalent for the improvements; but I can conceive no reason for declining to find adequate evidence of compensation in the act of a landlord who gives over to an improving tenant, because he is an improving tenant, the soil with all its natural powers, at a price so far below the fair letting value of the landlord's interest as to recoup the tenant for his improvements. I cannot agree with Mr. Justice O'Hagan that the tenant under this rule would be "worse off under the Act of 1881 than he was under the Act of 1870." Under the final clause of the 4th section of the Act of 1870, as regards improvements made before the passing of that Act (to which improvements alone the clause applies), the Court *must, in reduction of the tenant's claim*, take into consideration the time during which he may have enjoyed the advantages of the improvements, whether enjoyed under a lease or other tenancy at a fixed rent or not; whereas, under the Act of 1881, the question of compensation can only arise in respect of advantages derived by the tenant from the landlord's voluntary permission to hold the lands at a rent so far below the fair letting value of the landlord's own interest therein as to afford to the tenant an equivalent for his improvements, which rent it is in the power of the landlord fairly to increase.

There remains the question to which I am obliged to give the most ample consideration, on account of my position with respect to the differences of opinion existing upon it, viz., "Whether the lease of the 2nd of March, 1846, excludes the tenant from any interest in respect of the improvements made before the execution of that lease, in the ascertainment of the fair rent of the holding under the Act of 1881?"

The principle upon which three members of the Court are enabled to construe the words "predecessors in title" in section 8, sub-section 9, as unaffected by section 7 of the Act of 1881 for them answers this question in the affirmative, independently of the special circumstances of the particular case, as the decision in *Holt v. Harborton* (1) rules the point directly, unless the 7th section takes effect. The decision in which six members of the Court concur, and by which the final clause of section 4 of the Act of 1870 is applied to, and must in any case reduce any claim of the tenant, and confer upon the landlord a right to some rent in respect of the improvements made before the lease, now nearly forty years ago, brings down the amount dependent upon this question, as between David Adams and Jane Dunseath, at most to some paltry figure. I further understand THE MASTER OF THE ROLLS and my LORD CHIEF BARON to concur in the view which I am about to state, to this extent, that they held that if the Land Commission should agree in my conclusions of fact, the lease should be treated as the *terminus* from which the tenant's rights must be taken to commence; and that the landlord must in that case be allowed a full and fair rent upon the present value of the house built in 1844. The difference which I understand to exist between them and me upon this question is, that upon the facts stated in this special case I feel bound to draw, or rather I find drawn, an inference of fact as to the nature and effect of the transactions connected with the granting of the lease, which, while not indicating any opinion that it should not be drawn, they think that the Land Commission, which has the exclusive jurisdiction to decide questions of fact, has not decided upon the case, nor do they think that facts enough have been stated to reduce it to a question of law.

With all the doubt and deference with which I must at any time put forward an opinion of my own differing from that entertained by my respected colleagues, I am driven to the opinion that a very serious question of principle is at stake, on

(1) Ir. R. R. & L. App. 82.

which I cannot concur with their conclusion. Section 7 is, in my opinion, a provision of limited and defined operation. I think that it does not, either for its own purposes or in its reflex effect upon section 8, sub-section 9, require us to disregard continuity of title, or to dispense with the necessity of tracing title altogether, except only in the case of defined limited and mainly technical or formal breaks arising from changes of tenancy or of tenants, not amounting to the creation of new holdings or tenancies in freshly defined subjects-matter actually contemplated as such. The 1st paragraph of section 7 deals with the case where the same tenant holds in succession what are no doubt legally different tenancies. The 2nd paragraph deals with the case where different persons have, in like manner, in succession held legally different tenancies. The 3rd paragraph provides that in both cases the Court shall consider all the circumstances, and shall thereupon admit, reduce or disallow altogether the tenant's claim, as to the Court may seem just; and it describes the events dealt with in both the previous paragraphs, and with which alone the section is conversant, as "such change of tenancy or of tenants."

It seems to me that the key to the whole section must be found in limiting its operations to changes of tenancy or of tenants in subjects-matter, that is to say, in holdings, which are really continuous, and which remain substantially and in the contemplation of the parties the same. The definitions of "holding," "contract of tenancy," "tenancy," and "tenant" are relative and dependent upon each other, and their connexion depends, in my opinion, upon *the identity*, in reality and substance, of *the holding*. Every "holding," as the subject-matter of a "tenancy," must, for the purposes of the Act, in my opinion, have some definite commencement, and this must be found in a transaction by which its identity is ascertained or declared by the contract, or according to the contemplation of the parties. Whatever works exist upon a holding must, whenever that holding in its existing state is defined as the subject-matter of a new tenancy, cease to be any longer regarded as "improvements." An "improvement" is defined as a work "which

adds to the letting value of the holding on which it is executed;" and it would be a contradiction in terms to hold that a work was an improvement of a holding which was at any time incorporated with that holding as an integral part of the holding itself.

Now in the present case what are the facts stated? Before 1842, 20A. 2R. 21P. of land were in the occupation of James M'Kee, who held as tenant under the Earl of Mountcashel, but at what rent did not appear, and under what tenure is not stated. In 1842 these lands were valued at £26 11s. 6d., which sum was paid by M'Kee from the time of the valuation, and he therefore appears to have been tenant from year to year at that rent from 1842 to the commencement of his lease. About 1844 the house was built, partly with the materials of an older house previously existing on the holding (a fact which alone would show that the total disallowance of rent to the landlord in respect of the building is erroneous). Prior to the building, the agent offered a lease to M'Kee, who "understood that he could have the lease if he liked;" on that understanding he built the house, and Mr. Justice O'Hagan in his judgment tells us that it is admitted that when he did so "the lease was contemplated." Thereupon on this understanding, and after completing the house, M'Kee took and executed a lease for thirty years from November 1st, 1845, in express terms demising the farm "with all houses and buildings thereunto belonging, as then in his actual occupation," with the usual covenant to keep and yield up the buildings in repair. I can give no other meaning to this transaction than that it was a complete and definite creation of a new tenancy in a holding which was then by contract, and in the actual contemplation of both parties at the time, expressly identified as comprising the house as an integral part of its subject-matter. Even taking it for granted (for the moment only) that section 7 would be otherwise applicable, could M'Kee, if he were now tenant under a tenancy from year to year arising on the expiration of that lease, claim to go behind the lease itself under the language of the 1st paragraph of section 7? I am of opinion that he could not, and it follows that his successor

under the lease cannot do so either. The language of the paragraph is strictly negative:—The tenant “shall not be *deprived of his right* to receive compensation for improvements by reason *only* of the determination of the tenancy subsisting at the time when such improvements were made, and the acceptance by him of a new tenancy.” I hold that M’Kee could have no right to receive compensation for works as improvements which, by the terms of the instrument creating his tenancy and in his own actual contemplation, were an integral part of the holding itself, and included in its original definition. It seems to me to be in itself a sufficient answer to the attempt to apply the 7th section to the case of the improvements made before the lease, that M’Kee never had any right in respect of them, and therefore neither he nor his successors could be aided by an enactment that he should not be deprived of any right which he possessed.

But even assuming the right to exist, the tenant seems to me to be met by another insuperable obstacle, for upon the facts stated he would be deprived of that right not “by reason *only* of the determination of the tenancy subsisting when the improvements were made, and the acceptance of a new tenancy,” but by the express terms and essential elements of that new tenancy itself as evidenced by the lease creating it, which expressly declares the existing house to be part of the subject-matter of the demise, at least when coupled with the fact that the granting of the lease and the inclusion of the house in the holding were actually “contemplated” before the house was built. I wish to guard myself against resting my opinion either on the terms of the lease alone or only on the contemplation of the building by the parties when the lease was granted, but both these elements concurring seem to me conclusive as well as to the form as also as to the substance of the transaction creating the leasehold tenancy in 1846, and mark the lease as the *terminus* of all the tenant’s rights in this case.

That the 7th section was not intended to apply to cases where any real ascertainment of, or any essential alteration

in, the holding has taken place, seems to me further demonstrated by the 2nd paragraph of the section; there the language is as qualified and as negative as in the 1st: "Where, *in tracing a title*, it appears that an outgoing tenant has surrendered his tenancy in order that some other person may be accepted as tenant *in his place*, and such other person is *so* accepted as tenant, the outgoing tenant *shall not be precluded* from being deemed the predecessor in title of the incoming tenant by reason *only* of such surrender of tenancy by him." This provision is conversant expressly with the tracing of a title, thus implying some definite origin and some ascertained subject-matter, and it merely protects the incoming tenant from being precluded by reason only of the fact that the tenancy of which the title is so traced has, in the course of its devolution, been momentarily and formally surrendered to the landlord, for the mere purpose of enabling one person to take the place of another in the position of tenant under a tenancy substantially the same. I have neither the jurisdiction nor the intention to discuss the nature or extent of the changes, such for example as variations of rent, additions of one holding to another, or the like, which may be justly brought within the operation of the section. What I do hold is that it was not intended to enable, and that it does not enable, a tenant who has accepted a definite and settled tenancy upon the terms of an express written letting describing his holding, as he understood and contemplated it to be, afterwards to go behind the instrument creating his tenancy, and to say that part of the subject-matter of the letting was no part of it at all, but on the contrary was an "improvement" executed upon it, giving him a right to receive compensation from his landlord on quitting, with the concurrent right to hold the property in the meantime free of rent.

But there is also an express provision of the Act of 1870 which seems to me to answer the contention of the tenant upon this lease. Those of us who hold that the final clause of section 4 operates to control the Act of 1881 must also hold the other provisions of the same section, where appli-

cable, to have a like operation. Now, section 4, proviso 2, excludes a tenant of a holding under a lease or written contract, made before the passing of the Act, from compensation in respect of any improvement his right to which compensation is expressly excluded by such lease or contract. This provision cannot be restricted to an express exclusion of rights *under the Act*, for as it applies only to leases made before the passing of the Act, except prophetically such rights could not be excluded. It must, therefore, extend to every case in which the claim to compensation is inconsistent with the express terms of the written instrument. Now, in my opinion, the declaration contained in this lease that the house is part of the holding, and is included in the subject-matter of demise, and the covenant to give up the house at the end of the term, is an express declaration that it is not to be regarded as an improvement, and therefore I think this lease is inconsistent with a claim for compensation going behind its date and terms. It is notable that even if the lease had expired after the Act of 1881 had come into force, the same argument would apply, under section 21 of that Act, which provides that "any leases or other contracts of tenancy existing at the date of the passing of this Act shall remain in force to the same extent as if this Act had not passed, and holdings subject to such existing leases shall be regulated by the lawful provisions contained in the said leases, and not by the provisions relating to tenancies in that behalf contained in this Act." It seems to me an impossible construction which would, because this lease expired between 1870 and 1881, disallow the landlord's claim to rent upon the house, though the lawful provisions of the lease would regulate his right, in exclusion of the statute, if it had lasted until the Act of 1881 had been passed.

There is another observation which I do not wish to be supposed to have overlooked, though I do not rest my judgment on it. It is not clear to me that section 7 of the Act of 1881 ought to be treated as retrospective, not only in *preserving* rights which might have accrued under the Act of 1870 after its passing, but also in *creating* rights,

at earlier dates, which otherwise could not have arisen, or that we ought to carry back the provisions of the statute as amended to the most remote periods of time from which evidence can be brought down, as if it had never taken effect in its original form. It would require further argument than the matter has yet received to satisfy me that, upon the principles applicable to such legislation, we are justified in giving any further *ex post facto* operation to a statute transferring rights from one person to another, beyond that which a strict fulfilment of its literal terms requires.

I am confirmed in my view of the effect of section 7 by a reference to the judicial decision which led to its enactment. The judgment of the majority of the Court in *Holt v. Harborton* (1), in the language of my Lord O'Hagan, who delivered it, was at least wide enough to cover the principle that any formal determination of a subsisting tenancy, though followed by the acceptance by the same person, or by another person in his place, of a new tenancy substantially the same, regardless of the absence of intention to entail any change either in the subject-matter of the tenancy or in the rights of the parties, would amount to an extinguishment of the title, and a destruction of all rights annexed to it. But in truth the facts of *Holt v. Harborton* (1) necessitated the adoption of no such sweeping principle. I have before me the original case stated, upon which it appears that the lease there in question comprised about ninety-two acres of additional land, of which the family of the lessee had not been previously in possession, and that the rent reserved by the lease was considerably less than the combined rents previously paid for all the lands, as well the original holding as the additional lands. The evidence stated on the case as to the circumstances under which the lease was granted is most material. After the house was built, the agent went over it, told the tenant that he would endeavour to get him a lease from Lord Harborton on account of the house, and said that "he would get him a lease in con-

(1) Ir. R. R. & L. App. 82.

sequence of having built the house, at the then present rent." The agent afterwards "asked Lord Harborton would he not give the tenant a lease in consideration of this house;" "he represented the house as finished, and urged on Lord Harborton to give him a lease, and Lord Harborton then consented to give him a lease." This oral evidence is set out in terms on the special case, and followed by this paragraph:—"The several matters stated in the foregoing evidence are for the purposes of this case to be assumed to be true." The questions reserved are, "Whether the existing lease is the *terminus* from which the improvements claimed by the appellant are to be allowed or disallowed?" and "Whether the appellant, *upon the facts and the law*, is disallowed from claiming compensation under the statute for the building of the dwelling-house on the lands demised?"

One member of the Court, the Lord Chief Baron, while concurring in the general judgment, based his decision, as upon this point I am now doing, on "the transactions by which the lease was obtained." I am satisfied that the same considerations which weighed with him in *Holt's Case* must still be taken into account under the 7th section of the Act of 1881, and that that section was not intended to create or save rights to compensation displaced by the principles of substance and of justice enunciated by the Chief Baron (Pigot), and not merely by the general principle sanctioned by the majority of the Court. With scarcely an alteration I apply Chief Baron Pigot's language to this case, and adopt it as my judgment upon the question now under consideration. I rest my judgment mainly on the transactions by which the lease was obtained. I think we are entitled to look into those transactions, because we are entitled to ascertain what was the subject-matter of the new contract of tenancy created by that lease. I am satisfied that in the present case these transactions created a perfectly new relation between the parties, lessor and lessee, by creating a new subject-matter of a perfectly new contract in 1846. I think it precluded the person who took that lease, and all deriving under him by that title, from setting up any claim for any benefit resulting from the building of the house which formed

part of the subject-matter of the new lease. I think to permit the lessee or anyone succeeding him in title to claim any further benefit from the building of that house would be inconsistent with the transactions and contract, and in effect would work a fraud upon the transaction and contract by which the entire holding, including this house, was demised by the lease, and is now enjoyed by the claimant.

In the interpretation of these Acts we cannot act with the same confidence as in most other cases upon the rule which is usually a safe guide, namely, that vested rights and vested property ought not to be disturbed, but at least we ought not to divest such rights or property unless the language of the statute plainly directs or necessarily implies that this shall be done. Mr. Litton defines the duty of the Court, in reference to the ascertainment of fair rent, in language which I find it hard to reconcile with his decision, but which commends itself to me as applicable to our own duty, and descriptive of the principle which ought to guide us to our decision. "To act otherwise," he says, "would be to transfer the property, or a portion of the property of one class to the other class, and to no extent ought this to be done. If it is our duty to recognise the tenant's interest, it is equally our duty to recognise that of the landlord, and we are bound by the highest consideration of duty to administer an Act which was intended to secure right in such a manner as that it may not become in our hands the instrument of wrong."

So far as the Act clearly leads me, I neither criticise its policy, hesitate to follow its directions, nor regard its consequences; but where I find the language involved negative and doubtful, I am bound, in seeking its true meaning, to consider the consequences of the opposing constructions, and to prefer that which leads to apparent justice as the true meaning of the legislature. For this purpose only, let us see the practical result of holding that the lease of 1846 did not define, as from a new starting-point, the subject-matter of M'Kee's tenancy. Having built the house, and got the lease for a term of thirty years from the 1st of November, 1845, M'Kee, on the 27th of October, 1846, with the approbation of the landlord, sold, and

once and for all assigned away all his interest in the holding to John Adams for the agreed sum of £240. For that sum; subject to the rent and covenants, Adams acquired the house and holding for the residue of the term, but not as the law then stood for a day longer, nor in fixing his price did he buy or pay for any right or title whatsoever lasting beyond the 1st of November, 1875. On the 13th of April, 1851, William Dunscath on the other hand, under judicial sanction, and through a Parliamentary conveyance, purchased for £6000 all the freehold interest for ever in the holding, subject during its term to the lease. In this price he paid for, and under that conveyance he acquired, the absolute interest in the house from and after the 1st of November, 1875. Any answer other than that which I have given to the question now under consideration would, at the least, place it in the power of the Land Commission to give this house for ever free of rent to a tenant who never bought it, and to disallow to the landlord for ever all title to rent from it, though thirty years ago he bought and paid for it at its full value, and had it conveyed to him by a Court under the sanction of a statute, and though after the passing of the Act of 1870 he fixed the terms of a new tenancy under a law which, under the then settled judicial interpretation of the statute, precluded the tenant from then claiming it as an improvement. Even with the palliative of the final clause of the 4th section of the Act of 1870, this is the result of the judgments which, while I am forced to differ from them, are most near to my own conclusion. But the judgment of my LORD CHANCELLOR, as I understand it, and the decision of the Judicial Commissioner and Mr. Litton, would leave no discretion in the matter, but would hold that this momentous transfer of vested property has been absolutely made by section 8, sub-section 9. In my opinion the statute did not contemplate and does not effectuate such a result; and even if there were less room for doubt, I should hold it my duty, against everything except such plain words as might easily have been used to preclude questions, so to read the law as to avoid the result I mention.

In this case the amount involved is small, but (in the way I

have indicated) we should see the consequences of admitting the principle of the decision. Mr. Justice O'Hagan meets the argument that his construction "would sweep away from the landlord's rent all improvements that, from time immemorial, have been executed on the soil, and leave nothing subject to rent but the waste and unimproved value of the land itself," by saying that "such an apprehension appears to me *chimerical*." "In the first place," he says, "the fact of the improvements themselves requires to be proved." Dealing as we are, with buildings, I apprehend those buildings, however old, will prove themselves, and so remove that difficulty. "In the next place," he says, "as regards all improvements made before the 1st of August, 1870, there are distinct limits placed to the presumption that such improvements were made by the tenant or his predecessor in title, and everything outside the statutory presumption must be proved; and although a formal surrender and acceptance of a new tenancy would no longer form a break in the title, yet the title must in reality and substance be traced from the tenant who executed the improvements to the tenant who claims in respect of them." As to the latter portion of this sentence, I need not again explain that in terms I concur with this statement of the law, and that the difference between Mr. Justice O'Hagan and myself is in our estimate of what is "a *formal* surrender and acceptance of a new tenancy" and what is "in *reality and substance*" the creation of a new title. My present concern is with the effect of relying on presumption to meet the consequences of the doctrine that a lease in terms defining the subject-matter of a demise, admitted to be contemplated as such by both parties at the time, is not the *terminus* from which all claims for compensation must commence. Presumption will arise only in the absence of evidence. The humble and illiterate tenant from year to year, not improbably the successor of generations of tenants occupying the same holding, under substantially the same tenancy, will be met and will be defeated by the presumption, so far as he cannot overcome it by the oral testimony of the oldest witnesses whom he can produce, though the facts, if capable of proof, might lay a just

ground for a legal claim. But what is to be done in the case of the great number of most valuable holdings which, throughout Ireland, have for long periods of years (extending, even in cases within my own experience, to centuries) been held under leases immediately succeeding each other, whether under powers of renewal at the tenant's option or otherwise, without any break in occupancy? If the present occupant under the last of a series of such leases were, at its expiration, to decline to take another, and to call upon the Land Commission to fix a fair rent for his holding, the successive leases would negative occupation by the landlord, and would afford evidence of continuous occupation by a tenant for the time being throughout the whole period. The existence of the buildings, their apparent age, and their present value, could be proved at once, and then Mr. Litton's rule of deducting that present value from the commercial value of the holding, as defined by him, being applied, I apprehend that the result would logically follow, leaving no room for presumption, that the transactions of ages must be disregarded, and the rent must be fixed upon the assumption that the tenant who held a "present tenancy" at the passing of the Act of 1881 is entitled to hold all the buildings on his holding absolutely rent free for ever, though none of his predecessors (including those who had erected those buildings) had ever enjoyed any such advantage. I think the construction of the statute leading to such a result ought not to be adopted unless unambiguously prescribed. I may remark that Mr. Litton, with Mr. Justice O'Hagan, refers only to the effect of "presumption from lapse of time," as moderating this effect of the statute of 1881. "When actual proof is given" (as, in the case I put, it would be by the documents of title), he says, "no length of time precludes the tenant from insisting that no rent shall be charged in respect of them."

It has been said by my LORD CHIEF BARON that the construction I adopt should equally exclude the tenant from the benefit of section 8, sub-section 9, in respect of the improvements made during the lease, as in respect of those made before its execution, on the ground that a second break in the title

occurred in 1875, when the lease was succeeded by a tenancy from year to year at a different rent. My answer is that here (even apart from the considerations arising on the written instrument of 1846) the facts are not found, and it is for the Land Commission to decide whether there was, or was not, in 1875 any substantial consideration by both parties of their position and of their rights, or any new definition of the subject-matter of the holding, such as the transactions ending in the granting of the lease constituted in 1846, or whether there was anything more than a continuation of substantially the same tenancy, in the same hands, with a mere re-adjustment of rent, but with no consideration of rights or contemplation of their alteration or surrender. In 1875 the tenant had a vested right to compensation for his improvements made during the currency of the lease: though the lands were valued, and the valuer stated to the Commissioners that, "he took no improvements into consideration, but kept the improvements out," the case does not authorise us (as that in *Holt v. Harberton* did) to assume that this evidence is true, while the exclusion of the improvements from rent might have been countervailed by the increase of the amount of rent from £26 11s. 6d. to £31 17s. 6d. I have, therefore, no means of determining whether in 1875 there was or was not that deliberate contemplation and determination by the landlord and tenant of their respective interests, or that actual and substantial creation of a new tenancy which would constitute the commencement of the tenancy from year to year in 1875 as the root of a new and distinct title or as a *terminus* from which the tenant's present rights and claims must take their origin. For the reasons I have already given, I think the granting of the lease of 1846 was such a *terminus* and origin, and therefore I answer the last question in the negative, but as to the transactions of 1875 I can draw no conclusion.

While remitting the case with our answers to the Court of the Land Commission, I think it necessary (lest I should be taken to accept the observations of Mr. Justice O'Hagan on the subject) to say that I can in no sense regard the determina-

tion of a fair rent as a "question of fact," within the meaning of Lord Chelmsford's *dictum* in *Gray v. Turnbull* (1). In the report of that case it appears that the matter in dispute was a part and parcel question, about an angle of ground described in the evidence as "only eight square yards in extent, and not worth five shillings intrinsically." This Court, in *Montgomery v. Montgomery*, refused to apply that *dictum* even to an important question arising upon the contradictory evidence of witnesses, and the House of Lords affirmed the decision; but I cannot admit the application of such a principle to the question of fair rent, which is eminently a question of judgment and of judicial discretion, and as to which Mr. Litton truly says, "The estimate of a fair rent is within certain limits as uncertain as the character of the man to whose judgment the question is submitted." Even where the Land Commission have, in the words of the 43rd section, thought it "expedient" to "delegate" the consideration of the matter in the first instance to a Sub-Commission, any person aggrieved is entitled to require his case to be reheard by the Commissioners themselves, and to have their judgment independently exercised upon it as a question calling for the exercise of their highest qualifications. I am confident that upon that question, as between the present parties and all others affected by like considerations, the judgment, and the only judgment, to which the law has confided its final settlement, viz., the judgment of the Court of the Land Commission, will henceforth be exercised with due regard to the statements of the law which it has been our duty now to pronounce, but in all other respects upon its own responsibility.

The Order of THE COURT, after reciting the questions submitted by the Court of the Land Commission, proceeded :—

"THE COURT, considering that the questions as presented cannot be treated solely as questions of law, but being of opinion that the following questions of law arise on the Case Stated, viz. :—

(1) What is the meaning of the term "improvements" in the 9th sub-section of section 8 of the L. L. (Ir.) Act, 1881?

(1) L. R. 2 H. L. 53.

(2) Whether the terms "tenant or his predecessors in title," in the same sub-section, have the same meaning respectively as in the 7th section of the same Act? (3) Whether the provisions of the final paragraph of the 4th section of the L. & T. (Ir.) Act, 1870, as to improvements made before the passing of that Act, are applicable to such improvements in determining fair rent under the 8th section of the L. L. (Ir.) Act, 1881? (4) Whether the enjoyment, during the currency of a lease, of improvements made by a tenant during such lease is a compensation by the landlord within the meaning of the 9th sub-section of section 8 of the L. L. (Ir.) Act, 1881? (5) Whether the lease of the 2nd of March, 1846, excludes the tenant from any interest in respect of the house built before the execution of that lease, in the ascertainment of the fair rent of the holding under the L. L. (Ir.) Act, 1881? It is considered and hereby declared, in answer to the 1st of the questions next hereinbefore mentioned, that the meaning of the term "improvements" is the same as in the L. & T. (Ir.) Act, 1870, section 70; and as to the 2nd, 3rd and 5th of the said questions, that they should respectively be answered in the affirmative; and that the 4th of the said questions should be answered in the negative."

Solicitors for the Tenant: *Messrs. Caruth & Currie.*

Solicitors for the Landlord: *Messrs. H. & A. Orr.*

FEBRUARY 20, 1882.

PETER CALLAN v. WILLIAM V. DOWDALL (1).

Practice—Application to dismiss Originating Notice to fix fair rent—Letting by the Master of the Court of Chancery by lease pending the Matter, or minority of infant landlord—Whether a present tenancy within meaning of the Land Law (Ireland) Act, 1881, is created after the determination of such a lease.

Held, that a lessee under the ordinary form of lease granted by the Court of Chancery for a term of seven years, or pending a Cause or Matter, is not, on its determination, entitled to claim the benefit of being a present tenant, and to so acquire against the inheritor a right to a statutory term for fifteen years being created.

Held also, that lettings under the Court of Chancery pending minority must be regarded as made for the temporary convenience of the parties, and are, therefore, within the exceptions contained in the Act of 1881.

Mr. G. V. Hart, for the tenant.

Mr. Bewley, Q.C., for the landlord.

The facts of the case are fully set forth in the judgment.

MR. COMMISSIONER LITTON, Q.C., delivered the judgment of the Court:—

In this case an application has been made on the part of William Vincent Dowdall, the owner of certain lands situate in the county of Louth, that the Originating Notice served by Peter Callan on the 28th day of October, 1881, to have a fair rent fixed, should be set aside, on the ground that he is not a present tenant of the lands in question within the Land Law (Ireland) Act, 1881. It appears that the father of Mr. William V. Dowdall died in the year 1862, leaving five children, three sons and two daughters, all minors, of whom Mr. William V. Dowdall was the youngest son. His two brothers died during minority, and Mr. William V. Dowdall succeeded to the estate while yet an infant, some time in the year 1875.

(1) Before the Full Court.

On the death of Mr. Dowdall's father, in 1862, the children were made wards of Court, and it having become necessary to raise a sum of £700 for the payment of outstanding debts or obligations affecting Mr. Dowdall's estate, an arrangement was entered into by which Mr. Peter Callan became tenant of the lands at a rent of £3 5s. per acre, and advanced a sum of £700, which was secured by a mortgage of the same lands, executed to Hugh Callan as his trustee. This lease, under which Peter Callan became tenant, was dated 13th of February, 1866, and was in the ordinary form of lease executed by the Master of the Court of Chancery for seven years pending the Matter, or minority of the then infant owner. When Mr. William V. Dowdall succeeded, on the death of his brother, a new lease in the like form from the Master of the Court was executed on the 25th of April, 1875, for a like period of seven years pending minority. Mr. Dowdall attained his age on the 23rd of January, 1881. He was discharged from the wardship of the Court by an order of the 9th of July, 1881, and by the same order the Receiver was also discharged. Mr. Callan paid the half-year's rent due the preceding 1st of May, 1881, to Mr. Dowdall, after the order of 9th of July, 1881. On the 21st of October, 1881, possession of the lands was demanded by Mr. Dowdall. This was replied to on Mr. Callan's part by service of the Originating Notice to fix a fair rent.

Under those circumstances the question arises, Is Mr. Callan entitled as a present tenant to have a fair rent fixed under the provisions of the Act, and thereby to acquire a statutory term for fifteen years against Mr. Dowdall, who otherwise would be entitled to be put into possession of his property by the injunction of the Court of Chancery?

We are of opinion that Mr. Callan is not so entitled, and that the application to set aside the Originating Notice must be granted.

We do not consider the relation of landlord and tenant ever existed between Mr. Dowdall on the one hand and Mr. Callan on the other, and we are not prepared to hold that a lessee under an ordinary lease for seven years pending minority, or pending

a Cause or Matter, executed by the Master of the Court of Chancery, can, on its termination, claim the benefit of being a present tenant, and so acquire against the inheritor a right to a statutory term.

There are two grounds upon which we rest our opinion, either of which would be sufficient to determine this case against Mr. Callan's claim to be considered a present tenant. The first has reference to the position which tenants under the Court of Chancery pending a Cause or Matter occupy to the Court and the owners of the estate respectively; and the second has reference to the provisions in the Acts of 1870 and 1881 (substantially the same) relating to lettings for the temporary convenience of the parties.

The Court of Chancery never had power, except in special cases under statutes, of which the 5 & 6 Will. 4 c. 17 affords an example, to make a lease which operated to actually pass an estate. Assuming jurisdiction as regards the control and management of the property, the Court of Chancery undoubtedly will accept proposals for the letting of lands, and will execute leases for a term of years pending the Cause or Matter; but such leases, executed by the Master or officer of the Court, or even by the Judge himself, pass no estate, and only operate by way of estoppel. The owners of the legal estate are not bound by the lease, although the Court will restrain them from enforcing their rights so long as they are subject to its jurisdiction. The practice has, therefore, been to limit the lease, where not made by virtue of some statute, to a period terminating with the Cause or Matter, or when the owner is a minor. In other words, the Court does not guarantee the possession longer than its jurisdiction over the party or parties to the suit or Matter continues.

In *Gibbins v. Howell* (1), where the Receiver appointed in a creditor's suit applied for a reference to the Master to inquire if it would be for the benefit of all parties that he should be enabled to grant leases of the estates, the Vice-Chancellor, Sir

John Leach, refused the motion, observing that "he recollected no instance in which the Court assumed jurisdiction to make leases which would bind the remainderman." In all cases where leases of certain duration have been made by the direction or with the approval of the Court, otherwise than under statute, the owner of the legal estate, or party having a power to lease, has been the party to demise, just as in sales by the Court the Court or Master never conveyed, but the conveyance was made by the parties having the legal estate, with the consent and approval of the Master.

Lord Hardwicke, in *Taylor v. Phillips* (1), and see *Russell v. Russell* (2), states "that no instance existed of the Court binding the inheritance of an infant by any discretionary act of the Court." In *Kerr on Receivers*, 144-5, it is observed that, "As between the lessee and the owner of the legal estate, however, the lease, in the absence of special circumstances, has no binding force, even though it may have been made with the sanction of the Judge." If necessary, recourse must be had to the various statutes conferring jurisdiction on the Court to sanction leases. And in *Smith on Receivers*, p. 65, "The Court has no jurisdiction to make leases which would operate to bind the interest of a remainderman, or for a term certain, but may for a term certain pending the Cause or pending minority. If the party in a Cause has a leasing power, and undertakes to join the Master in a lease, it may be done.

It is manifest then, that, as between the inheritor and the tenant under the Court pending minority, no relation subsists. On the termination of his minority the minor has a right to go into possession: *Garstin v. Nangle* (3); and the Court will grant an injunction for that purpose. It is contended, however, that under the 34th section of the 23 & 24 Vict. Mr. Callan has a right to continue upon the terms of his lease to the 1st November, as he was entitled to emblements, and consequently that he comes within the 21st section of the Act

(1) 1 Ves. 229.

(3) *Hayes & Jon. R.* 542.

(2) 1 Mol. 525.

of 1881, and must be deemed a present tenant. If this contention be well founded, nothing could be more unreasonable or unjust to Mr. Dowdall, who, coming of age last May, would on the 1st of November find himself deprived of the possession of his property.

There is no evidence whatever to show that Mr. Callan, admitting him to have been in a position to claim emblements in July 1881, was in fact entitled to such. But supposing him to have been in a position to claim emblements by reason of his having cropped the land, what is his position under such circumstances as a tenant under the Court? In *Creed v. Creed* (1), where the tenancy was determined by a sale made under authority of the Court, the tenant was held entitled to emblements, and an injunction would not be issued to put the purchaser into possession until the claim to emblements had been recognised. In that case the tenancy had been determined by the act of the Court itself. In *Jameson v. Farrer* (2) Baron Pennefather observes, "There is a contract to hold for seven years, provided the Cause lasts so long; that is the meaning of the expression 'pending the cause,' and it intimates that the tenancy may expire before the end of the seven years. The tenancy is not determined by the act of the lessor; the parties to the suit have a right to bring it to a termination as soon as they can; they are not the persons who let the lands, that is the act of the Court, and their rights are undisturbed by the letting." He adds, "with respect to *Creed v. Creed* (3), I fully accede to the decision of the Master of the Rolls, that in that case the tenant was entitled to the emblements," because there the Court which had made the letting terminated it by a sale, and the Court was in the situation of landlord.

In *Holmes v. Bowden* (4), where the suit was compromised before the expiration of the lease made pending the Cause, the injunction to put into possession only issued on the terms that the tenant should be recompensed for the crops in the ground:

(1) 3 Ir. Eq. 207.

(2) Ir. Eq. 514.

(3) P. 207.

(4) Hayes & J. 544, n.

In *Short v. Atkinson* (1), the case was dealt with as one which “did not substantially differ from one in which it would be the common law right of the tenant to claim emblements.” In *O’Connell v. O’Callaghan* (2), Baron Pennefather says: “We deal with tenants under the Court in this respect as if they were tenants at will, and a tenant at will is entitled to emblements. Therefore, before we permit the injunction to be executed, when the Cause is suddenly terminated, we require to be satisfied that no injustice would be done thereby to the tenant.”

Having regard to the distinctions acted on in the foregoing cases, it is not, we think, a matter of surprise to find that in *Hyde v. Roche* (3), it was decided that the Act of 14 & 15 Vict. c. 25, s. 1, did not embrace tenants holding under the Court of Chancery pending the Cause, and did not confer on them the right to elect to hold on to the end of the current year of their tenancy. And we fail to see any reason why the 34th section of the 23 & 24 Vict. c. 125 affects the decision in *Hyde v. Roche* in that respect, or that tenants under the Court should be held to be within the latter statute, when it has been held that they were not within the provisions of the former. Nor are we to be supposed to express an opinion that lessees who do come within the 34th section of the 23 & 24 Vict. c. 125 have the right to be regarded as present tenants of an expired lease, the prolongation of the term being in substitution of the right to emblements alone.

On the above ground we are prepared to decide against Mr. Callan’s claim to be deemed a present tenant; but we are further of opinion that lettings in Chancery pending minority must be regarded as made for the temporary convenience of the parties, and are, therefore, within the exceptions contained in the Act. Nothing would be more unjust or unreasonable than by such a letting to create as against the minor an estate in perpetuity, when the tenant came into possession not

(1) *Hayes & J.* 684.

(3) 5 *Ir. C. L.* 195.

(2) 3 *Ir. Eq. R.* 199.

by the act of the owner, but by the act of the Court, exercised for the benefit of the minor, and for a temporary purpose.

We are of opinion Mr. Bewley is entitled to carry his motion, and with costs.

Solicitor for the tenant : *Mr. Rogers.*

Solicitor for the landlord : *Mr. James Goff.*

MARCH, 1882.

JOSEPH GILSEMAN AND OTHERS, TENANTS, *v.* SIR
NATHANIEL STAPLES, LANDLORD.

Practice—Originating Notice to set aside lease, alleging threats of eviction and undue influence—Application for particulars—What particulars the Court will order to be given.

Application on behalf of the tenant to have lease declared void, on the ground that it contained terms unreasonable and unfair to the tenant, having regard to the provisions of the Landlord and Tenant (Ireland) Act, 1870, and was procured by the landlord by threat of eviction and undue influence. Motion on behalf of the landlord, that the tenant should inform him by whom, and at what times, and in what manner, the threats of eviction mentioned in the Originating Notice in this matter were made use of.

Held, that the tenant was obliged to give the names only of the witnesses upon whom he relied as to the proof of threats of eviction.

THE Originating Notices in these cases were served by the tenants to have certain leases of lands in the county of Dublin, and made since the passing of the Landlord and Tenant Act, 1870, set aside as containing covenants unreasonable and unfair, having regard to the provisions of said Act, and the acceptance of which leases was procured by the landlord by threat of eviction and undue influence.

J. H. Moore appeared for the landlord, in support of the application, and urged that, as there had been many persons in communication with the tenants, who, it might be asserted,

had used the alleged threats, that the present application was necessary, in order to prevent the landlord from being taken by surprise, or to be put to the expense of bringing witnesses from distant parts of the country.

George Fottrell, solicitor for the tenants, opposed the application, and relied upon Rule 23 of Schedule to the Judicature (Ireland) Act, 1877. *Thorpe v. Holdsworth* (1); Bullen & Leake's Precedents of Pleadings (3rd ed.), p. 566. The Originating Notice, which stands in the place of a pleading, complies strictly with Rule 23 of Schedule to Act, and states the material fact upon which tenant relies, viz., that his acceptance of the lease was obtained by threat of eviction: and what the landlord now asks is, that the tenant should not only be obliged to state this material fact, but that he should be obliged to state the evidence by which this fact is proved. The tenant submits that the landlord is not entitled to any such order from the Court.

MR. COMMISSIONER LITTON, Q.C., held that the landlord should be given the information necessary to prevent him from being taken by surprise, or being compelled to produce an unnecessary number of witnesses; but considered that the case would be sufficiently met by an order that the names of the persons who were alleged to have used the threats should be given. No costs to be given on either side.

Solicitors for the tenant: *Messrs. G. D. Fottrell & Son.*

Solicitors for the landlord: *Messrs. Hugh Moore & Son.*

(1) L. R., 3 Ch. Div. 637.

APRIL 25, 1882.

LEE v. DYSERT (1).

Application to compel landlord to produce reference to arbitration in order to make award in arbitration a rule of Court.

Where the reference to arbitration has not been lodged with the Court in compliance with Rule 132 L. L. (Ir.) Act, 1881, the Court cannot after award made interfere to compel either party to produce the reference, and the award cannot be recorded.

Todd, for the tenant :—

THIS application is rendered necessary by the conduct of the landlord. There was a reference to arbitration duly signed by both parties, and complying with Rule 132 of the Land Commission. This reference was left in the hands of the landlord's agent, and the arbitrators made their award on that reference. When the award was made, fixing the fair rent, the landlord was dissatisfied with it, and now refuses to produce, or to lodge in Court, the reference to arbitration, which, according to Rule 133, should be lodged along with the award of the arbitrators. Under these circumstances I have to apply to the Court that the landlord be compelled to bring the reference into Court for the purpose of being lodged, and to enable us then to proceed in accordance with Rules 134 and 135, to have the award recorded.

MR. COMMISSIONER LITTON :—

This Court has, in my opinion, no jurisdiction to make the order sought. The Court cannot originate a case, and at present there is no case in Court. In order to clothe the Court with jurisdiction, the reference should have been in the first instance (Rule 132) lodged with the Land Commission before the first sitting of the Arbitration Court thereunder. This rule has not been followed, and until the reference has been lodged

we have no control over the parties. The award of the arbitrators may be useful in fixing the fair rent before the Sub-Commission, who would probably act on the result arrived at; but as the parties never brought the case properly into this Court by lodging the reference, there is no jurisdiction to make the order. Mr. Howe, pressing his right to costs, is entitled to half a guinea costs of attendance.

Attorney for the landlord: *Howe & Son.*

Attorney for the tenant: *H. & R. Todd.*

APRIL 21, 1882.

WILLIAM H. EARL, LANDLORD; JOHN NEILL (1),
TENANT.

Application to set aside Originating Notice to have a fair rent fixed, on the ground that the tenant held under a letting for temporary convenience, as provided for by sect 58, sub-sect. 7, L. L. (Ir.) Act, 1881.

A held under lease for ten years from B. The lease recited that it was made as B was desirous of leaving Ireland for America, and it gave B a power of resumption at any time during the ten years, on fulfilling certain conditions. B went to America, and returned at the end of two and a-half years; but did not during the residue of the ten years, although residing near the demised holding, claim to exercise his power of resumption. The lease expired in March, 1882, and A claimed to be a present ordinary tenant under sect. 21 L. L. (Ir.) Act, 1881, and as such entitled to have a fair rent fixed. *Held*, that the letting was one to meet the temporary convenience of the landlord, sect. 58, sub-sect. L. L. (Ir.) Act, 1881, and that the Originating Notice to have a fair rent fixed should be set aside with costs.

THE following are the portions of the lease material to the case:—"W. H. Earl, being desirous to go to America for a limited period, has agreed to make this demise during his absence, or until he shall wish to resume the possession, unto the said John Neill. . . . To have and to hold from the

25th day of March, 1872, for the term of ten years thence next ensuing, fully to be completed and ended. . . . And further, that if the said W. H. Earl, his heirs or assigns, shall be desirous to resume the possession of the hereby demised premises at any time during the continuance of the term of ten years hereby granted, it shall be lawful for the said W. H. Earl, his heirs or assigns, so to do, on giving the said John Neill, his executors, administrators, or permitted assigns, six months' previous notice; . . . and thereupon these presents, and the term hereby demised, shall cease and determine; and that it shall be lawful for the said John Neill, his heirs, . . . in like manner at any time during the continuance of the aforesaid term, . . . on giving six months' previous notice . . . to the said W. H. Earl, his heirs or assigns, of his or their intention so to do, and thereupon these presents and the term aforesaid shall cease and determine."

J. G. Gibbon, for the landlord:—This case clearly comes within sub-sect. 7, sect. 58, L. L. (Ir.) Act, 1881. The letting was one for temporary convenience, and the landlord had not abandoned his right of resumption at the expiration of the term. The fact that he did not exercise his power of resumption during the term does not alter the temporary character of the letting.

M. Barton, for the tenant:—This tenant comes within the 21st section L. L. (Ir.) Act, 1882. The lessee was undoubtedly in *bonâ fide* occupation of this holding at the expiration of the lease. By sect. 57 the onus of disproving present tenancy is thrown on the landlord. It can scarcely be contended here that the letting was one coming under sub-sect. 7, sect. 58, for the landlord did not resume possession, as he might have done at any time within the last seven years, although the alleged temporary convenience, *i. e.* his going to America, had been determined. If the landlord now wished to resume possession of the holding he should do so in accordance with sect. 5, sub-sect. 6, L. L. (Ir.) Act, 1881.

MR. COMMISSIONER LITTON :—

The Originating Notice to have a fair rent fixed must be set aside. This case clearly comes within the exception provided for by sub-sect. 7, sect. 58, L. L. (Ir.) Act, 1881. It seems to me clear that the letting was one to meet a temporary necessity. It is so expressly stated in the lease itself, and it is clear to my mind that the landlord always regarded the letting as a temporary one, and looked forward to resuming his former possession on the expiration of the lease. It further appears to me that this farm was a "home farm" within the 2nd sub-sect. of sect. 58, and that on this ground also the tenant cannot claim to be a present tenant. This motion must be granted, with two guineas costs.

Attorney for the landlord: *R. C. Johnson.*

Attorney for the tenant: *W. F. Littledale.*

APRIL 27, 1882.

HARPER, TENANT; DAVIES, LANDLORD (1).

Appeal from the decision of the Land Commission Court setting aside an Originating Notice to have a fair rent fixed, on the ground that the tenant came within the exception provided for in sub-sect. 3, sect. 58 L. L. (Ir.) Act, 1881.

Where a tenant from year to year holding 172 acres of land under an agreement in writing that he should not break up more than eight acres, and that all hay made on the farm should be consumed thereon, served a notice on the landlord to have a fair rent fixed :—*Held*, that the holding came within sub-sect. 3, sect. 58, L. L. (Ir.) Act, 1881, and that the tenant was not entitled to have a fair rent fixed, under sect. 8, L. L. (Ir.) Act, 1881.

The facts of the case appear fully from the argument of counsel, and the judgment of the Court.

(1) Before LAW, C. ; MORRIS, C. J. ; DEASY, L. J., and FITZ GIBBON, L. J.

Cleary, for the tenant, the Appellant :—

THE question involved was whether the letting in the agreement mentioned was a letting wholly or mainly for the purpose of pasture, within the meaning of the 58th sect. of the Land Law (Ireland) Act, 1881. He referred, in the first instance, to the 71st section of Land Act of 1870, which provided that the Act should apply only to tenancies which were agricultural or pastoral, or partly agricultural and partly pastoral. He referred to Johnson's *Dictionary* as to the meaning of the words "agricultural" and "pastoral"—agriculture pointed to tillage; pastoral was not a word of art in law, and was used for the first time in the Act of 1870, and he contended included grass farms of two classes—grass to be eaten by the mouths of cattle, which was pasture, and grass to be mowed and to be converted into hay, which was meadow. It was the first class of such holdings only that answered the description of lands let wholly or mainly for the purpose of pasture. Co. Litt. 4 b, distinguishes *pastura*, land employed for the feeding of beast, from *prata*, meadow land; and it was plain under the old law that if the Plaintiff in his *præcipe* demanded twenty acres of *pastura*, he could not recover twenty acres of *prata*. From the Year-books down to the case of *Murphy v. Daly* (1), the distinction between ancient meadow and ancient pasture is distinctly recognised; and both meadow and pasture in books of pleading, and in the Judges' judgments, are used as words of art; and counsel submitted that the old meaning should be attributed to the word "pasture" in the Land Acts of 1870 and 1881, so that where the tenant was not bound to use the farm mainly for pasture, but had the option of using it for meadow, he was not within the exception; the prohibition against removing hay from the farm could not decide the question, for the tenant might meadow half the land, and consume the hay on the land in the winter in feeding young cattle and stall-feeding: and it would be an unreasonable distinction to hold that a tenant who was at liberty to meadow and sell was within the Act, while a

tenant who was at liberty to meadow, but not to sell, was excluded from its protection; having regard to the other tenancies mentioned in the section, such as accommodation farms, and farms let for temporary convenience, the pasture farms aimed at in the exception were of the same character, such as the grazing farms in Meath, which are set by auction for one or two years solely for the feeding of cattle. Counsel also submitted that he should be allowed to go before the Sub-Commission and give the evidence of experienced agriculturists that more than half the farm could be profitably meadowed, consuming the hay on the farm under the agreement. The case should not therefore be summarily dealt with by the Land Court, but the inquiry allowed to proceed, as the tenant was a man of large means. The proviso in the agreement that in case the tenant turned up any of the land he was to pay the landlord £7 an acre on demand was liquidated damages and not a penalty, so the tenant had the option of paying that sum per acre, to turn up the whole of the land, and keep it in tillage once during his tenancy. He cited *Kerr on Injunctions*, p. 412, *Farrant v. Olmius* (1); *French v. Macale* (2).

D. Colquhoun, Q.C., having been partly heard in support of the case for the Respondent the landlord, the Court intimated that it did not think it necessary that he should conclude his argument, and proceeded to deliver judgment.

LAW, C. :—

It appears to us that this tenancy is one which falls within the terms of the exception in section 58, sub-section 3, of the Land Law (Ir.) Act, 1881, as being a holding which has been let mainly for the purpose of pasture. The contract of tenancy is embodied in a written instrument, dated the 13th April, 1865, whereby the lands were let to the Appellant, subject to certain provisions, the most material of which for our present purpose are as follows:—After demising the lands of Naptown, containing about 172 statute acres, to be held from year to year

(1) 3 B. & Ald. 692.

(2) 2. D. & W. 269.

at a certain rent, the agreement proceeds thus: "All the land that is not now under grass, to be properly sown by the tenant, this present spring, with clover and hayseed, with the exception of one field, which must be well and properly cleaned, and be put under green crop; and also with the exception of the paddock lying to the south of the farm-yard, and the field adjoining it to the south-east;" describing the paddock and adjoining field as containing eight acres. It then further provides that the field which was to be cleaned and put under green crop the first year should in the next season be laid down with clover and grassseed, whilst the eight acres, consisting of the specified paddock and adjoining field, might be kept in tillage, or laid down in grass, at the tenant's option. The natural meaning of this would seem to be that all the farm was to be kept in grass, with the exception of the eight acres just referred to. Subject to that exception, every field that was not already in grass the tenant bound himself to put into grass; and it cannot therefore be reasonably contended that when he had once done this he was to be at liberty forthwith to break it up and keep it in tillage if he pleased. That would be a very unnatural construction of the agreement, and inconsistent too with what is implied by the express permission to keep in tillage the eight acres. The plain meaning of the agreement, as it seems to me, was, except the specified eight acres, all the farm was to be put into and kept in grass. But then it is argued that even so it does not follow that it was let to be used mainly for the purpose of *pasture*, and that if the contract admitted of the land in grass being all "meadowed," or used for the production of hay, the letting would not be one mainly for the purpose of pasture. The agreement, however, contains some further provisions which, in my opinion, show that the use of the land for meadowing or hay-farming was not in the contemplation of the parties. It contains a clause in these terms:—"The tenant is not to remove nor allow to be removed any hay from the said farm, with the exception of such portion of the hay crop of the year 1866 over and above what he may require for consumption on the farm." It then provides that if the tenant breaks up any of the land

then in grass, or *thereby agreed to be put under grass*, he is to pay £7 an acre for the land so broken up. And, finally, in consideration of the tenant putting the land under grass, the landlord agrees to allow the tenant £10 half-yearly for the first two years.

It is plain to us, on the language of this agreement, that the parties to it contemplated a letting mainly for the purpose of pasture, and nothing else. It no doubt allowed of hay being made on the farm; but as it did not permit that hay to be removed off the farm, the parties must be taken to have intended that only so much hay should be made as would be needful for supplementing the actual pasturage of the cattle on the farm. Speaking for myself, I think the test is not whether the landlord could or could not obtain an injunction against the tenant to prevent his breaking up any of the land that was in grass—though I have a strong opinion on that point too—but rather whether, on the whole of the written contract, the Court is satisfied that the use of the land for pasture was mainly what the parties had in view.

As to this we are all, I believe, clearly of opinion that, having regard to the terms of this contract of tenancy, the holding was let to be used mainly for the purpose of pasture, and that the appeal should therefore be dismissed with costs.

Attorney for the landlord: *Davis & Montford.*

Attorney for the tenant: *F. Kennedy.*

DIGEST OF CASES.

Agreement for a Lease.

Where there is a question as to the existence of a binding agreement for a lease, the Court will leave the landlord to his remedy by seeking to enforce specific performance in a Court of Equity, p. 104.

Appeal.

The Land Commission Court will not vary the order of the Sub-Commissioners fixing a fair rent, unless they are shown to have erred in principle or to have seriously erred in amount, pp. 123-4.

Application on first occasion.

The time for applying to the Court on the first occasion (sect. 60) is extended to Nov. 12, inclusive, pp. 6, 91.

Arbitration.

Where there has been a reference to arbitration to fix a fair rent, the reference must be lodged in accordance with Rule 132, L. L. (Ir.) Act, 1881, otherwise the award in arbitration will not be recorded: *Lee v. Dysert*, p. 243.

Bankrupt.

In case of an absconding bankrupt, service of notice of sale required by G. O. 87 will be dispensed with: *Meares v. Heron*, p. 23.

How Originating Notice should be entitled; service on receiver: *Hanann v. Dornville*, p. 33.

Compensation.

A claim for compensation under L. & T. Act, 1870, must be commenced before the County Court and not before the Land Court: *Knife v. Armstrong*, p. 13.

Costs.

No costs, unless in special circumstances, should be given by Sub-Commissioners to either landlord or tenant in proceedings to have a fair rent fixed, p. 125.

Costs of appeal should follow the result of the appeal, p. 125.

Extension of Time for Redemption.

An application to extend time for redemption under sect. 13 can be made only

Extension of Time for Redemption—continued.

when the application is to sell, and not when the application is to fix a fair rent, p. 5.

An application to enlarge the time to redeem or sell, without prejudice to the right to be considered a present tenant and have a fair rent fixed, is inconsistent with the latter right, and will be refused: *Baillie v. Montgomery*, p. 24.

Where there has been a decree for possession and a renewal of decree, the time to redeem runs from the original decree, and not from the renewal: *Marsh v. Moreland* (No. 2), p. 28.

Time extended pending the hearing of an application to have a fair rent fixed: *Barrett v. Ventry*, p. 91.

Extension of Time for Sale.

Where tenant has been served with a notice to quit, and an ejectment decree obtained on such notice to quit, prior to the passing of the L. L. (Ir.) Act, 1881, the tenant has power to sell under sect. 13, sub-sect. 1, at any time up to the execution of ejectment decree: *Laverty v. Moore*, p. 36.

Where a lease expired prior to the passing of the L. L. (Ir.) Act, 1881, and the landlord obtained a decree in ejectment for overholding, but did not execute the decree, the tenant has no power to sell under sect. 13, sub-sect. 1: *Rutledge v. Rutledge*, p. 41.

Fair Rent.

Considerations to be regarded in fixing, p. 126.

The amount which the improvements of the tenant or his predecessors in title have contributed to the present letting value should not be allowed to the landlord, p. 128.

In determining fair rent under sect. 8, L. L. (Ir.) Act, 1881, the provisions of the final paragraph of sect. 4, L. & T. (Ir.) Act, 1870, as to improvements made before the passing of that Act are applicable, p. 234.

Improvements.

Landlord not entitled to rent in respect of

Improvements—continued.

improvements made during the continuance of a lease, pp. 107, 234.

Mere enjoyment of possession under a lease not such compensation as meant by L. L. (Ir.) Act, 1881, sect. 8, sub-sect. 9, pp. 107, 234.

"Improvements" in sect. 8, sub-sect. 9, L. L. (Ir.) Act, 1881, must be construed as defined in the L. & T. Act, 1870, pp. 148, 234.

"Improvements" mean not the increased letting value produced by the improvement-works, but the improvement-works themselves, p. 149.

Jurisdiction of Court, definition of "first occasion on which it sits."

Tenant applying to Court within time so defined is put in same position as if he applied on August 22, 1881, p. 91.

Landlord.

Where more than one, both must be named in Originating Notice: *M'Closkey v. Cook*, p. 20.

In case of death of landlord, his representative must be served with Originating Notice: *In re Vandeleur*, p. 28.

Lease.

Originating Notice to set aside should be served first; then notice to fix fair rent, when the first has been heard: *Cooper v. Duigenan*, p. 20; *Gering v. D'Arcy*, p. 21.

The question as to whether an unexecuted lease can operate as an equitable lease is one which should be tried upon *viva voce* evidence before the Sub-Commission, and not on affidavit before the Land Commission: *Nicoll v. Bourke*, p. 21.

Application to have lease declared void. Jurisdiction to be exercised by the Court in setting aside leases: *Levinge v. Darcy*, p. 57.

Application to have lease declared void. Lease executed under coercion or threat of eviction. Covenants unreasonable or unfair to the tenant, having regard to the provisions of the Act of 1870. Jurisdiction to be exercised by the Court in setting aside leases: *Bligh v. Kirwan*, p. 59.

Application to have lease declared void, on the ground that it contained terms which were unreasonable and unfair, having regard to the provisions of the Act of 1870:—*Held*, that the provisions of the lease, taken

Lease—continued.

in their entirety, amount of rent, as well as everything else, will be taken into consideration in determining whether the lease contains terms unreasonable and unfair to the tenant, having regard to the provisions of said Act: *Ewart v. Gray*, p. 67.

Application to declare lease void. Tenant not having the legal estate, but being the equitable and beneficial owner of the lease, entitled to apply. Notice to quit not necessary to constitute threat of eviction. Excessiveness or lowness of rent will be considered as a guide to the fairness of the other terms in the lease: *Kelly v. Griffith*, p. 85.

A lessee under the ordinary form of lease granted by the Court of Chancery for seven years, or pending a cause or matter, is not on its determination entitled to the status of a present tenant: *Callan v. Dowdall*, p. 235.

Lettings.

Lettings under the Court of Chancery, pending minority, are for temporary convenience, under sub-sect. 7, sect. 58, L. L. (Ir.) Act, 1881: *Callan v. Dowdall*, p. 235.

Where a tenant held under a lease for ten years, reciting that it was made as the landlord was desirous of leaving Ireland for America, and giving power of resumption within the ten years, the letting was one for temporary convenience, sub-sect. 7, sect. 58, L. L. (Ir.) Act, 1881; and the tenant on determination of lease cannot apply to the Court as present tenant, under sect. 8, L. L. (Ir.) Act, 1881: *Earl v. Neill*, p. 244.

Minor

must be served through his guardian with Originating Notice: *Marsh v. Moreland*, p. 18; *In re Mauleverers*, p. 19.

Originating Notice.

Must have a stamp for one shilling, p. 2.

The copy to be produced at hearing should be stamped, but any copy stamped is sufficient, p. 3.

The landlord must be specially named in Originating Notice; naming "the representatives" of a deceased person is not sufficient: *Howard v. Representatives of Conway*, p. 19.

Originating Notice cannot be served on a minor; his guardian must be served: *Marsh v. Moreland*, p. 18. As to practice in such

Originating Notice—continued.

cases, see also *In re Mauleverers, Minors*, p. 19.

Where more than one landlord, service of Originating Notice must be on all: *McGloskey v. Cook*, p. 20.

Originating Notice to fix a fair rent cannot be served concurrently with an Originating Notice to declare lease void: *Cooper v. Duignan*, p. 20, and *Gering v. D'Arcy*, p. 21.

The service of an Originating Notice upon the clerk of the landlord's agent *Held* to be good service. Right of appeal. When appeal not allowed: *Falconer v. Cramsie*, p. 63.

Where several distinct holdings are included in one Originating Notice it will be set aside, p. 103.

Particulars.

Where tenant serves Originating Notice to set aside lease under sect. 21, L. L. (Ir.) Act, 1881, on application by landlord for particulars of, by whom, when, and in what manner the tenant was threatened, the Court ordered that the tenant should furnish the names only of the party or parties who threatened him: *Gilsenan v. Staples*, p. 241.

Pastoral Holding.

Where tenant from year to year held 172 acres under an agreement not to till more than eight acres, and to consume on the farm all hay made on the farm, the letting was one wholly or mainly for the purpose of pasture, and came within sub-sect. 3, sect. 58, L. L. (Ir.) Act, 1881: *Harper v. Davies*, p. 246.

Predecessors in Title.

A prior tenant may be deemed the predecessor in title of a subsequent one, if in reality and substance the tenancy is derived by the latter from the former, p. 117.

"Predecessor in title," sect. 8, sub-sect. 9, L. L. (Ir.) Act, 1881, has the same meaning as in sect. 7 of same Act, pp. 153, 170, 191, 192, 213, 234.

Representatives

of a deceased landlord must be specifically named in Originating Notice: *Howard v. Representatives of Conway*, p. 19.

Representatives—continued.

In case of death of landlord, his representatives must be served: *In re Vandeleur*, p. 28.

Restraining.

The Land Court will not restrain plaintiff from executing ejectment decree of County Court pending notice to fix fair rent; such application should be made in County Court: *Simple v. Hunter*, p. 9.

Stamp.

Originating Notice must bear one shilling stamp, p. 2.

The copy retained to be produced at hearing should be the one stamped, but if any copy is stamped it is sufficient, p. 3.

Notice of Appeal must have one shilling stamp, p. 2.

Originating Notices may be stamped *ex post facto* when they have been served unstamped, if stamped before hearing, p. 3.

Stay on Execution

refused, where ground is that an Originating Notice to fix a fair rent has been served: *Warburton v. Conroy*, p. 33.

Substitution of Service.

Court willing to grant it, p. 3.

Substitution of Service of Notice of Sale by Execution Creditor (Form No. 13) will be made *ex parte*, but no costs of such *ex parte* application will be given: *Baldwin v. Heas*, p. 7.

Tenancy,

when taken in execution by sheriff prior to passing of L. L. (Ir.) Act, 1881, and a conveyance executed to purchaser subsequent to passing of Act, falls outside the Act, so far as the former tenant is concerned: *Stack v. Plummer*, p. 31.

Time—See Extension of.**Town Park.**

Defence that farm is a town park should be raised before Sub-Commission, not before the Land Commission, in the first instance: *Lawler v. Moore*, p. 17.

Transfer.

A land claim under the L. & T. Act, 1870, will not be transferred from the County Court to the Land Court. The Land Court has not primary jurisdiction in such case: *Knipe v. Armstrong*, p. 13.

Right to transfer to Land Commission: *Shiel v. Borrowes*, p. 35.

Valuator.

Where tenants interfere with landlord's valuator, and prevent valuation, the hear-

Valuator—*continued.*

ing of their claim to have a fair rent fixed will be adjourned. Costs given against the tenants: *Dunphy v. Lord Mountgarrett*, p. 62.

Witness.

No person can be witness to an agreement between landlord and tenant to fix a fair rent, save the person mentioned in General Rule 100: *Sweeny v. Carter*, p. 30.

